

No. 12422

United States
Court of Appeals
For the Ninth Circuit.

LOMAX TRANSPORTATION COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Eastern District of Washington
Northern Division.

FILED

FEB 2 - 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

WITHERSPOON, WITHERSPOON & KELLEY,
Old National Bank Bldg.,
Spokane, Wash.

Attorneys for Appellant.

HARVEY ERICKSON,
United States Attorney,

FRANK R. FREEMAN,
Asst. United States Attorney,
P. O. Bldg.,
Spokane, Wash.

Attorneys for Appellee.

In the District Court of the United States for the
Eastern District of Washington, Northern Division

No. 697

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOMAX TRANSPORTATION COMPANY,

a corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and Frank R. Freeman, Assistant United States Attorney, and complains of the defendant and for cause of action alleges:

I.

That on or about April 22, 1946, Lomax Fireproof Warehouses, Inc. changed its corporate name to Lomax Transportation Company and has its registered office at West 915 Second Avenue in the City of Spokane, Washington, and Lomax Transportation Company is liable for all the debts, obligations and contracts of the Lomax Fireproof Warehouses, Inc.

II.

That on October 2, 1944, Lomax Fireproof Warehouses, Inc., entered into Negotiated Contract No. N66s-231 with the United States of America, whereby Lomax Fireproof Warehouses, Inc., agreed to store certain naval supplies belonging to the plain-

tiff for a period beginning October 2, 1944, and ending June 30, 1945, in its warehouse at 124 South Wall Street in Spokane, Washington.

III.

That on or about December 26, 1944, a fire occurred in the aforesaid warehouse at 124 South Wall Street, Spokane, Washington, which resulted in destruction and loss to the plaintiff's naval property to the extent of \$16,415.87.

IV.

That demand has been made upon the defendant for said sum, but the defendant has refused to pay the same.

V.

That a special provision of said contract provided as follows:

“4-A. Contractor assumes absolute responsibility for property in his possession and shall maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws.”

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$16,415.87, plus its costs and disbursements herein.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ FRANK R. FREEMAN,

[Endorsed]: Filed November 14, 1947.

Assistant U.S. Attorney.

District Court of the United States for the Eastern
District of Washington, Northern Division

Civil Action File No. 697

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOMAX TRANSPORTATION COMPANY,
a corporation,

Defendant.

SUMMONS IN A CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve upon Harvey Erickson, United States Attorney, Frank R. Freeman, Assistant U.S. Attorney, plaintiff's attorneys, whose address 334 Federal Building, Spokane, Washington an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

A. A. La FRAMBOISE,
Clerk of Court.

[Seal] By /s/EVA M. HARDIN,
Deputy Clerk.

Date: November 14, 1947.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Return on service of writ attached.

[Endorsed]: Filed Nov. 17, 1947.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Lomax Transportation Company, a corporation, and moves the Court to dismiss the above-entitled action upon the following grounds:

I.

That the complaint fails to state a claim upon which relief can be granted in that the defendant company would only be responsible for exercise of ordinary diligence and care, but would not be responsible for loss or damage to goods caused by fire, act of God, or other causes beyond its control.

II.

That the complaint fails to state a claim upon which relief can be granted in that it appears on the face of the complaint and particularly by paragraph V that the plaintiff seeks to interpret the contract as a wagering contract in contravention to public policy which precludes the defendant company becoming an insurer without submitting to the regulations of insurance companies.

III.

That the complaint discloses that there is a defect of parties defendant.

IV.

That the complaint discloses that the plaintiff has no legal capacity to sue in that no facts are alleged indicating a failure of defendant to maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws.

V.

That the complaint discloses that the plaintiff has no legal capacity to sue in that no facts are alleged that the defendant failed to operate as a warehouseman in accordance with the State of Washington Warehousing Laws.

VI.

That the complaint states a claim which would be violative of defendant's Constitutional rights, particularly under the Fifth Amendment to the Constitution of the United States which guarantees that no person shall be deprived of property without due process of law nor shall private property be taken for public use without just compensation.

/s/ WILLIAM V. KELLEY,

WITHERSPOON,

WITHERSPOON & KELLEY,

Attorneys for Defendant.

Service of the foregoing Motion to Dismiss is hereby acknowledged this 4th day of December, 1947.

/s/ HARVEY ERICKSON,

Attorneys for Plaintiff.

[Endorsed]: Filed December 4, 1947.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS AND
GRANTING IN PART MOTION TO MAKE
MORE DEFINITE AND CERTAIN OR FOR
A BILL OF PARTICULARS

This matter coming on for hearing before the above-entitled Court on the 8th day of December, 1947, and the plaintiff being represented by Frank R. Freeman, Assistant United States Attorney, and the defendant being represented by William V. Kelley, its attorney, and argument of counsel having been had and the Court being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that the Motion to Dismiss is denied with exception to defendant allowed.

It Is Further Ordered, Adjudged and Decreed that the Motion to Make More Definite and Certain or for a Bill of Particulars is granted as to paragraph II of said motion with leave to plaintiff to set forth copy of said contract by way of a Bill of

Particulars, and denied as to the rest of said motion with exception to defendant allowed.

Dated this 9th day of December, 1947.

/s/ SAM M. DRIVER,
U.S. District Judge.

Presented by:

/s/ W. V. KELLEY,
Attorney for Defendant.

Approved as to form:

/s/ FRANK R. FREEMAN,
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 9, 1947.

[Title of District Court and Cause.]

BILL OF PARTICULARS

Comes now the plaintiff herein and in compliance with the order of the Court, dated December 9th, 1947, sets forth the following contract between the United States of America and Lomax Fire Proof Warehouses, Inc., dated the 2nd day of October, 1944:

Negotiated Contract No. N666s-231
Opening 2 October, 1944

CONTRACT (Supplies)

Req'n No. NT4-64-8052

Bu. Supplies & Accounts Station (666) Naval
Supply Depot

App'n 1750803.10 Maintenance, Bu SandA, 1945
Purchasing Office Naval Supply Depot, Spokane,
Washington

Department. Navy Department

Contractor. Lomax Fire Proof Warehouses, Inc.

Contract for Services, Storage & Handling

Amount, \$ Such sums as may become due

Place Naval Supply Depot, Spokane, Washing-
ton.

This Contract, entered into this second day of
October, 1944, by the United States of America,
hereinafter called the Government, represented by
the contracting office executing this contract, and
Lomax Fire Proof Warehouses Inc. (i) a corpora-
tion organized and existing under the laws of the
State of Washington

(ii) ~~a partnership consisting of~~

(iii) ~~an individual trading as~~

whose address is S. Wall Street, Spokane, Wash-
ington hereinafter called the Contractor, witnesseth
that the parties hereto, pursuant to the provisions
of the First War Powers Act, 1941, do mutually
agree as follows:

Article 1.

Scope of this Contract.—The Contractor shall fur-
nish and deliver all of the articles and perform all
of the services, described in the schedule, consisting
of———sheets attached hereto, for the considera-
tion stated therein, free from defects in material or

workmanship and in strict accordance with the specifications and drawings attached to or designated in such schedule, all of which are made a part hereof. "General Specifications for Inspection of Material," issued by the Navy Department July 1, 1941, shall also form a part of this contract. The rights and obligations of the parties hereto shall be subject to the provisions contained in Articles 1 to 18 of this contract, such "General Specifications for Inspection of Material," and the provisions of the attached schedule. In the event of any inconsistency between the provisions of the said articles or such "General Specifications for Inspection of Material," and the provisions of the attached schedule, the provisions of the attached schedule shall be deemed to control to the extent of such inconsistency.

Deliveries shall be made as stated in the attached schedule.

All shipments by the Contractor shall be marked by the Contractor in accordance with provisions of "Navy Shipment Marking Handbook," issued by the Navy Department, Bureau of Supplies and Accounts.

Article 2.

Changes.—The specifications, drawings, or designs applicable to any of the items covered by this contract (and also, in the case of spare parts, the quantities or designations), or any provisions with respect to the method of shipment or packaging or the place of delivery, may be changed at any time by the contracting officer by written notice given to

the Contractor. Any such change may be made without notice to the sureties, if any, and the Contractor shall give effect to such change without delay. If any such change so ordered shall involve an increase or decrease in the amount or character of the work to be done under this contract or in the time required for its performance, an equitable adjustment shall be made in the contract price and in such other provisions of the contract as may be necessary and the contract shall be modified in writing accordingly. Any claim for adjustment under this Article must be asserted within 10 days from the date the change is ordered: Provided, however, That the contracting officer, if he determines that the facts justify such action, may receive, consider, and adjust any such claim asserted at any time prior to the date of final settlement of the contract. In the event of the failure of the parties to agree upon the adjustment to be made, the dispute shall be determined in accordance with the Article hereof entitled "Disputes," but nothing contained in this Article shall excuse the Contractor from giving immediate effect to any change.

Article 3.

Extras.—Except as otherwise herein provided, no charge for extras will be allowed unless the same have been ordered in writing by the contracting officer and the price stated in such order.

Article 4.

Increase or decrease.—Unless otherwise specified, any variation in the quantities herein called for, not exceeding 10 percent, will be accepted as a compliance with the contract, when caused by conditions of loading, shipping, packing, or allowances in manufacturing processes, and payments shall be adjusted accordingly.

Article 5.

Inspection.—(a) All material and workmanship shall be subject to inspection and test by the Government during manufacture, when practicable, and at all other times and places. In case any articles are defective in material or workmanship, or otherwise not in conformity with the specification requirements, the Government shall have the right to reject such articles or require their correction or replacement. Rejected articles, or articles requiring correction, shall be removed by and at the expense of the Contractor promptly after notice so to do and shall not be used until corrected, reinspected and passed by the Government. Rejected articles not suitable for correction shall be so segregated by the Contractor as to preclude the possibility of use under this contract. In the event public necessity requires the use of materials or supplies which are defective in material or workmanship or not in accordance with the specifications, payment therefor shall be made at a proper reduction in price.

(b) All inspections and tests by the Government

shall be performed in such a manner as not to delay the work unduly. Special and performance tests shall be as described herein and in the specifications. If any inspection and test is made on the premises of the Contractor or a subcontractor, the Contractor shall provide a complete inspection system acceptable to the Government's inspectors and all reasonable facilities and assistance for the safety and convenience of the inspectors in the performance of their duties. In the event articles are not ready at the time inspection is requested by the Contractor, the Government may charge to the Contractor any additional cost of inspection and test.

(c) Final inspection will be made at the point of delivery, unless otherwise stated. Final inspection and acceptance shall be conclusive except as regards latent defects or fraud.

Article 6.

Responsibility for supplies tendered.—The Contractor shall be responsible for the articles covered by this contract until they are delivered, and the Contractor shall bear all risk on rejected articles after notice of rejection. Where final inspection is at point of origin but delivery by the Contractor is at some other point, the Contractor's responsibility shall continue until delivery is accomplished.

Article 7.

Payments.—The Contractor shall be paid, upon the submission of properly certified invoices or

vouchers, the prices stipulated herein for articles delivered and accepted or services rendered, less deductions, if any, as herein provided. Unless otherwise specified in this contract, payments will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the Contractor, payments for accepted partial deliveries shall be made whenever such payments would equal or exceed either \$1,000 or 50 percent of the total amount of the contract.

Article 8.

Federal excise taxes.—(a) Except as otherwise indicated in this contract, the prices stated herein exclude all Federal excise taxes in effect at the date of this contract and directly applicable to the completed supplies or work covered hereby, and upon the request of the Contractor, the Government will issue appropriate tax-exemption certificates with respect to such excluded Federal excise taxes.

(b) The prices stated herein include all other Federal taxes in effect at the date of this contract and incurred in performance hereof, including (i) all Federal excise taxes upon or with respect to materials entering into the production of such supplies or work, or used or consumed in connection with the production thereof, (ii) all Federal excise taxes upon transportation charges, and (iii) all other Federal taxes in effect at the date of this contract. If, after the date of this contract, the Federal Government shall impose or increase the rate of any

tax, duty, impost, excise or sale, use, transportation, occupational, gross-receipts tax, or any other similar tax or charge, other than a tax upon the income of the Contractor, directly applicable to the supplies of work covered hereby or to the materials used in the production of such supplies or work, or to the importation, transportation, production, processing, manufacture, construction, sale or use of such supplies, work, or materials, which tax or charge must be borne by the Contractor because of a specific contractual obligation or by operation of law, then (1) the prices stated herein will be accordingly increased and any amount due to the Contractor as a result of the increase in such prices will be charged to the Government and entered upon invoices as a separate item, or (2) at its option, the Government in lieu of payment of such increase will issue to the Contractor appropriate tax-exemption certificates or furnish other proof of exemption with respect to such tax or charge.

(c) If the Contractor is relieved from the payment of any Federal tax or charge or portion thereof included in the prices stated herein, by reason of the decrease or elimination of such tax, the Contractor shall promptly submit to the contracting officer a statement showing the amount of such decrease or elimination, and the prices shall be adjusted to reflect such decrease or elimination as agreed to, or in the event of failure to agree, as determined by the contracting officer, and the contract shall be modified accordingly.

Article 9.

Transfer of contract and assignment of claims.—

(a) Neither this contract nor any interest herein nor any claim arising hereunder, except as otherwise provided in this Article, shall be transferred by the Contractor to any party or parties.

(b) If this contract is not classified as “confidential” or “secret,” and if the contract provides for payments aggregating \$1,000 or more, claims for moneys due or to become due to the Contractor from the Government arising out of this contract may be assigned to any bank, trust company, or other financing institution, including any Federal lending agency. Any such assignment shall cover all amounts payable under this contract and not already paid, shall not be subject to further assignment, and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in the financing of this contract. In the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (1) the General Accounting Office of the Government, (2) the contracting officer, (3) the surety of sureties upon the bond or bonds, if any, in connection with this contract, and (4) the disbursing officer designated to make payments under this contract.

(c) Payments to an assignee of any claims arising under this contract shall not be subject to re-

duction or set-off for an indebtedness of the Contractor to the United States arising independently of this contract.

(d) Information contained in plans, specifications, or any similar document, relating to the work under this contract and marked "secret," "confidential," or "restricted," shall not, in connection with the assignment of any claim under the contract, be communicated, transmitted, or disclosed to any person not otherwise entitled to receive it, except with the prior consent of the contracting officer or his duly authorized representative in each instance.

Article 10.

Termination for default in delivery of articles or in performance of services.—The Government may, by written notice to the Contractor, terminate this contract as to all or any portion of the articles not already delivered or as to services not already performed whenever the Contractor fails to deliver any of the articles or to perform any of the services, herein provided to be furnished or performed, within the time specified herein or any extension thereof, and in the event of such termination the Government, in addition to any other remedies which it may have, may procure similar articles or obtain similar services elsewhere and the Contractor shall be liable to the Government for any excess cost occasioned the Government thereby; Provided, however, That the contract may not be terminated under this Article and the Contractor shall not be charged

with any liability for failure or delay in delivery or performance when such failure or delay is due to causes beyond the control and without the fault or negligence of Contractor, including but not restricted to (1) acts of God or of the public enemy, (2) acts of the Government of the United States or any State or political subdivision thereof, (3) fires, floods, explosions, earthquakes, or other catastrophes, (4) epidemics, (5) Quarantine restrictions, (6) strikes, (7) freight embargoes, (8) unusually severe weather, (9) inability of the Contractor to obtain equipment or material due to the operation of governmental priorities, preferences or allocations of equipment or material, and (10) delays of a subcontractor or supplier in furnishing material or supplies owing to causes beyond the control and without the fault or negligence of such subcontractor or supplier, including but not restricted to the foregoing enumeration, unless the contracting officer shall determine that the materials or supplies to be furnished under the subcontract are procurable from other sources and shall have ordered the Contractor to procure such materials or supplies from other sources; And provided, That the Contractor shall notify the contracting officer in writing of the cause of any such excusable failure or delay within twenty (20) days from the beginning thereof or within such longer period as the contracting officer shall, prior to the date of final settlement of the contract, specify for giving of such notice. Promptly on receipt of such notice, the contracting officer shall

ascertain the facts and extent of the failure or delay, and if he shall find that the failure or delay was occasioned by causes beyond the control and without the fault or negligence of the Contractor, he shall accordingly extend the time of delivery or performance or otherwise revise the delivery schedule. The finding of fact of the contracting officer shall be final and conclusive, subject only to appeal within thirty (30) days by the Contractor to the Secretary of the Navy or his duly authorized representative, whose decision on such appeal, as to the facts and extent of the failure or delay, shall be final and conclusive.

For necessary services as may be required for the balance of the fiscal year 1945, beginning 2 October 1944 and ending 30 June 1945 in connection with warehousing Navy Stores.

1. Such services and materials, including, but not by way of limitation, warehousing space, necessary to properly remove from cars, carry to place of rest, store in clean, dry and safe manner, and remove from place of storage F.O.B. cars, as required. Estimated quantity of stores 2,500,000 lbs.

Estimated quantity of storage space is from 40,000 to 75,000 sq. ft. located in warehouses of Lomax Fire Proof Warehouses at 124 S. Wall Street and 1208 Ide Street, Spokane, Washington.

2. Rates, bulk material.

A. \$.125 per hundred weight for first month storage, including removal from car to ware-

house and place of rest, and including moving out of warehouse F.O.B. car.

B. \$.035 per hundred weight per month thereafter for dead storage.

3. Rates, palletized material.

A. \$.11 per hundred weight for first month storage, including removal from car to warehouse and place of rest, and including moving out of warehouse F.O.B. car.

B. \$.03 per hundred weight per month thereafter for dead storage.

4. Special Provisions.

A. Contractor assumes absolute responsibility for property in his possession and shall maintain Bond and Insurance at his own expense in accordance with the state of Washington Warehousing Laws.

B. Contractor agrees to promptly remove from cars and store, or remove from storage and load in cars, materials at an estimated rate of six carloads per day at each warehouse. The Contractor will not be required to handle more than twelve carloads per day, either unloading or loading, unless by prior agreement with the Supply Officer in Command or Stores Officer, Naval Supply Depot, Spokane, Washington

In the event the contractor fails to locate

shipment for unloading or to load outgoing cars promptly and demurrage accrues, it shall be for the account of the contractor.

C. The contractor shall furnish to the Supply Officer in Command, Naval Supply Depot, Spokane, Washington, Bonded Warehouse Receipts for all materials in storage.

D. The Supply Officer in Command, Naval Supply Depot, Spokane, Washington, shall furnish the contractor with Government Bills of Lading covering outgoing material as authority to make shipment.

E. Any wooden pallets which are not utilized in making shipments shall remain the property of the Navy and be made available for pickup by Naval Supply Depot, Spokane.

Inspection

The Supply Officer in Command, Naval Supply Depot, Spokane, Washington, or designated representatives, may, at any time, during life of contract, inspect storage conditions to see that they conform with terms of contract.

Invoices

Submit properly certified invoices in triplicate to the consignee, monthly, in accordance with attached instructions.

Clauses

The attached sheet entitled "Uncertain and Varying Needs of the Navy" form a part of this contract.

The Navy reserves the right to terminate the contract upon thirty days written notice to the Contractor.

Uncertain and Varying Needs of the Navy

The uncertain and varying needs of the Navy (or Government) make it impossible to determine the quantity or quantities of the articles and material described herein that may be required during the contemplated period of the contract. Estimated quantities are stated for information only. It is mutually understood and agreed that the Government will order and the contractor will deliver the quantities of the kinds of articles and materials described in the specifications that in the judgment of the ordering office may be required during the contract period, except as may be otherwise indicated in the bid. These supplies will be ordered from time to time during the life of the contract in such quantities for delivery in such forms and to such places provided for by the contract as the needs of the Naval Service requires. Bids made with the proviso that the total deliveries will not exceed a certain specified quantity will be considered, but the right is reserved to reject any bid which provides that the Government shall guarantee to take any definite quantity.

Additional Applicable Clause

Contract Proviso

Article e. Overtime compensation of laborers and mechanics.—This contract is subject to the provisions of Section 303 of the Second Supplemental National Defense Appropriation Act, 1941 (Public No. 781, 76th Congress), approved September 9, 1940.

Forward invoice in triplicate (original and two copies) to the Supply Officer in Command, Naval Supply Depot, Spokane, Washington. The original is to have an autographic signature. The signature on the duplicate invoice may be typed or stamped. All copies of invoice are to bear the Navy Order number and be certified as follows:

“I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that state or local sales taxes are not included in the amounts billed.”

.....

Company Name

By.....

Official title as Mgr., etc.

Article 11.

Termination for convenience of the Government.

—The Government may, by written notice to the

Contractor, terminate this contract as to all or any portion of the articles not already delivered or as to services not already performed, whenever the contracting officer shall determine that such termination is for the best interest of the Government. Such termination shall become effective on the date specified in such notice, which date shall not be earlier than 10 days after the date of receipt thereof by the Contractor. In the event of such termination, the Government shall pay to the Contractor within a reasonable time (1) an amount equivalent to the aggregate of the unit prices, as specified in the contract, for services performed and for articles completed and delivered and accepted by the Government and not previously paid for, and (2) an amount representing fair compensation to the Contractor, with due regard to the amounts already paid to it or to be paid under (1) hereof and to its costs, expenditures, liabilities, commitments, work and expenses of settlement, and including such allowance for profit as is reasonable under all the circumstances: Provided, however, That the total sum to be paid to the Contractor in the event of such termination shall not exceed the total contract price for full performance of the contract. In the event of failure of the parties to agree upon the amount to be payable hereunder, such amount shall be determined in accordance with the Article hereof entitled "Disputes."

Article 12.

Patents.—The Contractor shall hold and save the

Government, its officers, agents, servants, and employees, harmless from patent liability of any nature or kind, including costs and expenses, for or on account of any patented or unpatented invention made or used in the performance of this contract, including the use or disposal thereof by or on behalf of the Government: Provided, That the foregoing shall not apply to inventions covered by applications for United States Letters Patent which, on the date of execution of this contract, are being maintained in secrecy under the provisions of Title 35, U.S. Code (1940ed.), Section 42, as amended.

Article 13.

Walsh-Healy Act.—If this contract is for a definite amount in excess of \$10,000 or for an indefinite amount which may exceed \$10,000, there are hereby incorporated herein by reference the representations and stipulations pursuant to Public Act No. 846, 74th Congress, known as the Walsh-Healy Public Contracts Act, as set forth in Article 1 of Par. I of Regulations No. 504, issued by the Secretary of Labor pursuant to such Act, as from time to time amended.

Article 14

Officials not to benefit.—No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15.

Covenant against contingent fees.—The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Article 16.

On discrimination in employment.—The Contractor, in performing the work required by this contract, shall not discriminate against any worker because of race, creed, color, or national origin. The Contractor further agrees that each subcontract made under this contract will contain a similar provision with respect to nondiscrimination.

Article 17.

Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written

appeal by the Contractor within 30 days to the Secretary of the Navy or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with performance.

Article 18.

Definitions.—(a) The Term “Secretary of the Navy,” as used herein, shall mean the Secretary, Under Secretary, or any Assistant Secretary of the Navy, and the term “his duly authorized representative” shall mean any person authorized to act for him other than the contracting officer.

(b) The term “contracting officer,” as used herein, shall include his duly appointed successor or his authorized representative.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF
AMERICA,

/s/ J. BALL

By J. BALL, Captain (SC) USN
Supply Officer in Command
(Official title)

LOMAX FIRE PROOF
WAREHOUSES, INC.
(Contractor)

By /s/ J. M. LOMAX

President

(Official title)

S. 124 Wall Street,

Spokane, Wn.

(Business address)

Two witnesses:

/s/ HELEN FERGUSON

/s/ B. C. REDHEAD

I, W. W. Witherspoon, certify that I am the Secretary of the corporation named as contractor herein; that J. M. Lomax who signed this contract on behalf of the contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[Corporate Seal]

s/ W. W. WITHERSPOON

Dated this 16th day of December, 1947.

/s/ HARVEY ERICKSON,

U.S. Attorney.

/s/ FRANK B. FREEMAN,

Assistant U.S. Attorney.

[Endorsed]: Filed December 16, 1947.

[Title of District Court and Cause.]

ORDER FOR PRE-TRIAL CONFERENCE
UNDER RULE 16

To: Harvey Erickson, United States Attorney, for plaintiff, Federal Building, Spokane 6, Washington; Witherspoon, Witherspoon & Kelley, 1114 Old National Bank Building, Spokane 8, Washington, Attorneys for defendant.

By virtue of Pre-trial Rule 16 of the Rules of Civil Procedure for the District Courts of the United States, you are hereby directed to appear before the undersigned Judge of the above entitled Court on Wednesday, February 25, 1948, at 10:00 o'clock, a.m., in the Judge's Chambers, in the Post Office Building, at Spokane, Washington, to consider:

(1) The simplification of the issues.

(2) The necessity or desirability of amendments to the pleadings.

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.

(4) The limitation of expert witnesses.

(5) Such other matters as may be of aid in the disposition of the action.

The Clerk of this Court is directed to forthwith serve this order upon the above named parties by

mailing a copy thereof to their attorneys at the addresses disclosed by the record herein.

Dated this 11th day of February, 1948.

/s/ SAM M. DRIVER,

United States District Judge.

Copy mailed counsel 2/11/48.

[Endorsed]: Filed February 11, 1948.

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL CONFERENCE

Pursuant to an order for pre-trial conference under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 25th day of February, 1948, Harvey Erickson, appearing as Attorney for the Plaintiff, and William V. Kelley appearing as Attorney for the Defendant.

Defendant admits paragraph 1 of plaintiff's complaint and it is stipulated that the defendant is a corporation organized under the laws of the State of Washington.

It is stipulated that either party may offer in evidence the contract a copy of which is attached to the bill of particulars on file herein, without objection to its authenticity.

Defendant's oral motion to amend its answer is granted and said defendant is allowed two (2) weeks in which to file said amended answer.

It is ordered that this pre-trial conference be, and the same is hereby continued to March 29, 1948, at 10 a.m.

Dated this 25th day of February, 1948.

/s/ SAM M. DRIVER,
U. S. Judge.

Copies mailed Feb. 25, 1948.

[Endorsed]: Filed February 25, 1948.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the defendant, Lomax Transportation Company, a corporation, by its attorneys, and with leave of Court for an amended answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Admits paragraph I.

II.

Admits paragraph II.

III.

Answering paragraph III, admits that a fire occurred without any negligence on the part of defendant at the time and place alleged and denies each and every other allegation, matter and thing therein alleged and further alleges that within a short time

after the occurrence of said fire, a Navy Board of Inquiry on behalf of plaintiff investigated the causes of said fire and found there was no apparent negligence on the part of the defendant and that recovery from the defendant under the insurance alleged in Article 10, Paragraph 4, Special Provisions, Sub-division A, of the contract set forth in plaintiff's bill of particulars, would be limited to the defendant's legal liability under existing Warehouse Laws of the State of Washington; that defendant's liability under said laws and particularly Remington's Revised Statutes §3607 was and is limited in the absence of an agreement to the contrary to losses or injuries to goods which could not have been avoided by the exercise of such care in regard to them as a reasonably careful owner of similar goods would exercise.

IV.

Admits paragraph IV.

V.

Admits paragraph V.

Further answering plaintiff's complaint and as a first affirmative defense, defendant alleges:

I.

That the said contract was drawn and made by the plaintiff on a printed form contract designated as S and A Form 102 (Revised May 1943); that said form contract is a contract for the procure-

ment of supplies and is not adapted to the leasing of warehouse space and that it contains much irrelevant and immaterial matter in fine print.

II.

That at and before the making and execution of said written contract set forth in plaintiff's bill of particulars, the plaintiff and the defendant intended that said instrument should mean and that the legal consequences thereof should be as follows, to-wit: that the defendant company would only be responsible for the exercise of ordinary diligence and care and would not be responsible for loss or damage to said goods caused by fire, act of God, or other causes beyond its control.

III.

That through the mutual mistake of the plaintiff and defendant, the said written contract did not and does not truly express the aforesaid intentions of the parties thereto and does not truly express or set out what were intended to be the legal consequences of said written contract in this, to-wit: that the phrase, "Contractor assumes absolute responsibility for property in his possession. ." contained in Article 10, Section 4 A of the said written contract purports to impose upon the defendant a liability in excess of that intended by the parties as more particularly set forth in paragraph II of the first affirmative defense; that said phrase was typewritten in said contract under the direction of

the contracting officer of the plaintiff and that said contracting officer was without authority to impose such a liability upon the defendant herein without the approval of the Bureau of Supplies and Accounts and the Assistant Secretary of the Navy, Material Division (Procurement Branch, Insurance Section); that the said contract was not approved by the Bureau of Supplies and Accounts and the Assistant Secretary of the Navy, Material Division (Procurement Branch, Insurance Section); that at the time of execution of said contract the Navy Department had adopted a policy of self insurance of government owned goods in the hands of contractors and that contractors in possession of government owned goods were to be liable only for loss due to their own negligence or misdoing.

IV.

That the defendant was not negligent in signing said written contract; that said phrase, "The contractor assumes absolute responsibility for goods in his possession. ." when read in connection with the balance of the sentence, " . . in accordance with the State of Washington Warehousing Laws," is ambiguous and meaningless and does not impose any liability upon the defendant in excess of that imposed by the laws of the State of Washington.

Further answering said complaint and as a second affirmative defense thereto, defendant alleges:

I.

That defendant did maintain Bond and Insurance at its own expense in accordance with the State of Washington Warehousing Laws, and the plaintiff, United States, by its conduct in accepting warehouse receipts in connection with the storage of its goods, and its own interpretation of its own contract construed the contract as one for a warehouseman's legal liability and is therefore estopped and precluded from seeking to interpret the contract as an insurance contract; that said warehouse receipts specifically provided in part concerning the liability of defendant as follows:

“Received for the account of Naval Supply Depot, Velox, Washington for storage, the goods or packages enumerated in the schedule below, upon the following terms and conditions, said goods stored in warehouse located at No. 124 S. Wall Street, Spokane, Washington.

“The Company will be responsible for exercise of ordinary diligence and care, but not responsible for ordinary wear and tear in handling, nor for loss or damage to said goods caused by moth, fire, rust or deterioration, Acts of God, or other causes beyond its control.”

Wherefore, this defendant prays that plaintiff's complaint be dismissed and for all other equitable relief in the premises, including the reformation of said contract to express the true intention of the

parties, together with its costs and disbursements in this action.

/s/ W. V. KELLEY,
WITHERSPOON, WITHER-
SPOON & KELLEY,
Attorneys for Defendant.

Service of the foregoing Amended Answer is accepted this 11th day of March, 1948.

/s/ HARVEY ERICKSON,
Attorney for Plaintiff.

[Endorsed]: Filed March 11, 1948.

[Title of District Court and Cause.]

MOTION TO STRIKE PORTION OF
DEFENDANT'S ANSWER

Comes now the attorneys for the plaintiff and move the Court to strike

1. Paragraph 3 of the defendant's answer except that portion which admits that a fire occurred.

2. The First Affirmative Defense for the reason that the matter set forth in the said First Affirmative Defense cannot be asserted against the Sovereign and that the matters therein alleged are incompetent, irrelevant and immaterial to the issues presented by plaintiff's complaint.

3. The Second Affirmative Defense for the reason that the matters therein contained are incom-

petent, irrelevant and immaterial to any of the issues set forth in the plaintiff's complaint and estoppel and laches are not assertable against the Sovereign.

/s/ HARVEY ERICKSON,
/s/ FRANK R. FREEMAN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed March 12, 1948.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The pre-trial conference, called by the Court in the above-entitled cause, pursuant to Rule 16, Rules of Civil Procedure for District Courts, came on regularly for hearing before the Court, in Chambers, on April 1, 1948, at 10:00 o'clock, a.m., plaintiff appearing by its attorney, Harvey Erickson, United States Attorney, and the defendant appearing by its attorney, William V. Kelley, of Witherspoon, Witherspoon & Kelley, and the Court being fully advised in the premises,
It Is Ordered:

1. That with reference to a folder of documents, described as "The Board of Investigation File of the Navy Department", which has been deposited with the Clerk and marked as plaintiff's identification "1", it is agreed that any document therein

may be offered at the instance of either party and admitted in evidence without proof of its execution and authenticity, and without producing or accounting for its original, if the document is a copy, each party, however, reserving the right to except to the admissibility of any such document on the ground of irrelevancy, immateriality or incompetency.

2. It is further agreed by the parties that in the above-entitled case the Court may take judicial notice of any pertinent portion, provision, or article of an official publication of the Navy Department, known as the "Bureau of Supplies & Accounts Manual", a copy of which is now in the office of the United States Attorney, at Spokane.

Dated this 1st day of April, 1948.

/s/ SAM M. DRIVER,

U. S. District Judge.

[Endorsed]: Filed April 1, 1948.

[Title of District Court and Cause.]

REQUESTS FOR ADMISSION UNDER RULE 36

Comes now Plaintiff by Harvey Erickson, United States Attorney, and Frank R. Freeman, Assistant United States Attorney, pursuant to the provisions of Rule 36 of the Rules of Civil Procedure, and requests the admission by the defendant of the gen-

uineness of the following document described herewith:

“Under the terms of the aforesaid contract, the debtor agreed to furnish such services and materials as may be required and to store for the balance of the fiscal year beginning October 2, 1944, and ending June 30, 1945, a quantity of Navy stores in warehouses located at Lomax Fire Proof Warehouses at 124 South Wall Street, and 1208 Ide Street, Spokane, Washington. The debtor further agreed to assume absolute responsibility for the property in its possession and to maintain bond and insurance at its own expense in accordance with State of Washington Warehousing Laws.

“On the afternoon of December 26, 1944, a fire occurred in the Lomax Fire Proof Warehouse, 124 South Wall Street, Spokane, Washington, which resulted in loss and damage to Navy property, and since the debtor has failed to reimburse the Government for such loss and damage, it is indebted to the United States in the sum of \$16,415.87, a shown by the following statement:

Material	Repacked	Salvaged	Destroyed	Unit Value	Appr. Unit Value	Total Damage to Navy
Pillows	320	70		.60	4.50	\$ 37.50
Twill	8266	27738 yds		.50	4,154.80	9,714.20
Towels		2350 pkgs	26075	.0868	203.98	2,263.31
Jumpers	4837			9.00		
Cups, coffee..	480					
Chinaware ..	3172	46	386	.20	9.20	77.20
Glassware	6192	158	17698	.17	13.43	3,022.09
Containers ..	1128	869	253	.52	8.69	574.75
Direct labor—Salvage operations—Job No. 315-26.....						568.96
Direct Materials—Salvage operations—Job No. 315-26.....						270.27
Total damages.....						\$16,528.28
Less amount previously allowed on claim No. 2032679(1)						112.41
Total amount due the United States.....						\$16,415.87

It is requested that the defendant admit the genuineness of each of the itemized amounts set forth in the above schedule and the total damage to the Navy as outlined in column 7 of the schedule above outlined.

/s/ HARVEY ERICKSON,
/s/ FRANK R. FREEMAN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 9, 1948.

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and Frank R. Freeman, Assistant United States Attorney for said District, attorneys for plaintiff herein, and in reply to defendant's first affirmative defense alleges as follows:

I.

The allegations of Paragraph I are admitted insofar as they allege that the contract was drawn and made by the plaintiff and defendant on a printed form for the procurement of supplies, but that by including typewritten provisions was made applicable to the lease of warehouse space.

II.

That the allegations of Paragraph II are denied.

III.

That the allegations of Paragraph III are denied.

IV.

That the allegations of Paragraph IV are admitted insofar as they allege that the defendant was not negligent in signing the written contract. The

remainder of the allegations of paragraph 4 are denied.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ FRANK R. FREEMAN,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed April 1, 1949.

[Title of District Court and Cause.]

INTERROGATORIES

Comes now the plaintiff, under the provisions of Rule 33 of the Rules of Civil Procedure, and in pursuance of the provisions of that rule propounds the following interrogatories to the defendant for answer:

1. State whether or not any attempt was made by the plaintiff, after execution of negotiated contract N666S231 on October 2, 1942, and the date of the institution of this action on November 14, 1947, to secure a reformation, revision, or modification of the above contract.

2. If the answer to No. 1 is "yes", give in detail the steps taken by the defendant corporation to secure administrative relief pursuant to naval regulations. Set forth any correspondence had with the

Naval Department seeking to secure said reformation, revision, or modification of said contract.

3. If the answer to No. 1 is in the affirmative, state the name of the officer of defendant corporation having any verbal or oral conferences seeking a revision, modification or reformation of the above contract.

4. If the answer to No. 1 is in the affirmative, give the names of any officers or personnel of the United States Navy who had any oral conversation with the agents of the defendant corporation seeking a revision, modification or reformation of the above contract with the dates as nearly as possible when such oral conversations took place.

5. Relate any other steps that have been taken by the defendant to secure administrative relief in the above contract by the defendant after the execution of said contract before the occurrence of the fire and after the occurrence of the fire and between the time of the institution of this action in the United States District Court.

6. State the name of the officers or individuals referred to in paragraph No. 2 of the defendant's first affirmative defense who stated to the defendant that the defendant company would only be responsible for the exercise of ordinary diligence and care, and would not be responsible for loss or damage to

said goods caused by fire, an act of God, or other causes beyond its control.

Dated this 31st day of March, 1949.

/s/ HARVEY ERICKSON,
U. S. Attorney.

/s/ FRANK R. FREEMAN,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed April 1, 1949.

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME TO ANSWER PLAINTIFF'S INTERROGATORIES

The parties stipulate, through their undersigned attorneys, that the time within which the answers to plaintiff's interrogatories, served March 31, 1949, may be served upon plaintiff may be extended to May 1st, 1949, subject to the approval of the Court.

Dated this 7th day of April, 1949.

/s/ HARVEY ERICKSON,
Attorney for Plaintiff.

/s/ WILLIAM V. KELLEY,
WITHERSPOON, WITHER-
SPOON & KELLEY,
Attorneys for Defendant.

[Endorsed]: Filed April 7, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO ANSWER
PLAINTIFF'S INTERROGATORIES

This matter coming on for hearing before the Court on stipulation of counsel, and the Court being fully advised in the premises,

It Is Hereby Ordered, Adjudged And Decreed that the defendant may have to and including May 1st, 1949, in which to answer interrogatories of plaintiff herein served March 31, 1949.

Dated this 7th day of April, 1949.

/s/ SAM M. DRIVER,
U. S. District Judge.

Presented by:

/s/ HARVEY ERICKSON,
U. S. Attorney.

Approved as to form:

/s/ W. V. KELLEY.

[Endorsed]: Filed April 7, 1949.

[Title of District Court and Cause.]

ORDER ON MOTION TO STRIKE

This matter coming on for hearing before the Court, and the Court having heard the argument of counsel and having considered the briefs of both plaintiff and defendant, and being fully advised in the premises, it is by the Court

Ordered, Adjudged And Decreed that paragraph 1 of plaintiff's motion to strike paragraph III of defendant's amended answer will be granted, except that portion of paragraph III which reads as follows:

"Answering paragraph III, admits that a fire occurred without any negligence on the part of the defendant at the time and place alleged and denies each and every other allegation, matter and thing therein alleged."

It Is Further Ordered that the plaintiff's motion to strike the first affirmative defense will be denied and that plaintiff's motion to strike defendant's second affirmative defense will be granted and said second affirmative defense will be stricken in its entirety.

Dated this 7th day of April, 1949.

/s/ SAM M. DRIVER,
U. S. District Judge.

Presented by:

/s/ HARVEY ERICKSON,
U. S. Attorney.

Approved:

/s/ W. V. KELLEY,
Attorney for Defendant.

[Endorsed]: Filed April 7, 1949.

[Title of District Court and Cause.]

REPLY TO INTERROGATORIES

Comes now the defendant and in response to the interrogatories served upon the defendant by the plaintiff on the 31st day of March, 1949, answers as follows:

1. In answer to the first interrogatory: None except as shown by the pleadings.
2. In answer to the second interrogatory: None.
3. In answer to the third interrogatory: None.
4. In answer to the fourth interrogatory: None.
5. In answer to the fifth interrogatory: None.
6. In answer to the sixth interrogatory: The defendant company does not know the names of the officers or individuals referred to.

Dated this 30th day of April, 1949.

LOMAX TRANSPORTATION
COMPANY,

Now Lomax Realty Company.

By /s/ JESSE M. LOMAX,
President.

State of Washington,
County of Spokane—ss.

Jesse M. Lomax, being first duly sworn on oath deposes and says:

That he is the President of Lomax Transportation Company, now Lomax Realty Company, the defendant in the above entitled action, and makes this verification for and on its behalf; that he has read the foregoing Reply to Interrogatories, knows

the contents thereof and believes the same to be true.

/s/ JESSE M. LOMAX.

Subscribed and sworn to before me this 30th day of April, 1949.

/s/ W. V. KELLEY,

Notary Public in and for the State of Washington,
residing at Spokane.

[Endorsed]: Filed April 30, 1949.

[Title of District Court and Cause.]

REPLY TO REQUEST FOR ADMISSION
UNDER RULE 36

Comes now the defendant, Lomax Transportation Company, now Lomax Realty Company, and in reply to the Request for Admission under Rule 36 served upon the defendant by the plaintiff herein admits and denies as follows

I.

Admits that those portions of one "Certificate of Settlement" set forth in plaintiff's Request for Admission are genuine and true portions of said Certificate of Settlement.

II.

That the defendant cannot truthfully admit or deny the various items of damage and the total amount of damages set forth in said portions of the Certificate of Settlement for the reason that naval

personnel were in exclusive charge of all salvage operations and did not permit defendant or any of its agents to be present during such salvage operations, wherefore the defendant has no knowledge or belief as to the amount of said damages if any.

Dated this 4th day of May, 1949.

LOMAX TRANSPORTATION
COMPANY,

Now Lomax Realty Company.

By /s/ J. M. LOMAX,
President.

State of Washington,
County of Spokane—ss.

Jesse M. Lomax, being first duly sworn on oath deposes and says:

That he is the President of Lomax Transportation Company, now Lomax Realty Company, the defendant in the above entitled action, and makes this verification for and on its behalf; that he has read the foregoing Reply to Request for Admission under Rule 36, knows the contents thereof and believes the same to be true.

/s/ J. M. LOMAX.

Subscribed and sworn to before me this 4th day of May, 1949.

[Seal] /s/ A. H. TOOLE,
Notary Public in and for the State of Washington,
residing at Spokane.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on before the above entitled Court for hearing on this 5th day of May, 1949, Plaintiff being represented by Harvey Erickson, United States Attorney, and the defendant being represented by William V. Kelley of Witherspoon, Witherspoon and Kelley, its attorneys, and the Court having heard the testimony introduced makes the following Findings of Fact:

I.

That on or about April 22, 1946 the Lomax Fireproof Warehouses, Inc., changed its corporate name to Lomax Transportation Company and has its registered office at West 915 Second Avenue in the City of Spokane; that Lomax Transportation Company is liable for all debts, obligations and contracts of the Lomax Fireproof Warehouses, Inc.

II.

That on October 2, 1944 the Lomax Fireproof Warehouses, Inc., entered into Negotiated Contract No. N666s-231 with the United States of America, whereby Lomax Fireproof Warehouses, Inc. agreed to store certain naval supplies belonging to the Plaintiff for a period beginning October 2, 1944 and ending June 30, 1945, in its warehouse at 124 South Wall Street in Spokane, Washington.

III.

That on or about December 26, 1944 a fire occurred in the above described warehouse which resulted in destruction and loss to the Plaintiff of naval property stored in the said warehouse in the amount of \$16,415.87. No proof of Defendant's negligence was submitted.

IV.

That the contract contained a special provision providing as follows:

“Contractor assumes absolute responsibility for property in his possession and shall maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws.”

V.

That the Defendant has failed to show that there was a mutual mistake as to the inclusion of the above provision in the contract.

From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

I.

That the Plaintiff have Judgment against the Defendant in the sum of \$16,415.87 plus its costs in the sum of \$37.06, without interest to the date

of entry of Judgment, with interest thereafter until paid in the sum of 6% per annum.

Dated this 6th day of September, 1949.

/s/ SAM M. DRIVER,
U.S. District Judge.

Presented by:

/s/ HARVEY ERICKSON,
U.S. Attorney.

Approved as to Form:

.....

Witherspoon, Witherspoon &
Kelley,
Attorneys for Defendant.

[Endorsed]: Filed September 6, 1949.

United States District Court for the Eastern Dis-
trict of Washington, Northern Division
No. 697

UNITED STATES OF AMERICA,
Plaintiff,
vs.

LOMAX TRANSPORTATION COMPANY, a cor-
poration,
Defendant.

JUDGMENT

This matter coming on before the Court for hear-
ing on this 5th day of May, 1949, the Plaintiff be-
ing represented by Harvey Erickson, United States

Attorney, and the Defendant being represented by William V. Kelley of Witherspoon, Witherspoon and Kelley, its attorneys, and the Court having heard the testimony introduced and having considered the briefs submitted by Plaintiff and Defendant, and having made its Findings of Fact and Conclusions of Law, and it appearing to the Court from the evidence that the Plaintiff should be entitled to Judgment against the Defendant, it is therefore by the Court

Ordered, Adjudged and Decreed that the Plaintiff have Judgment against the Defendant in the sum of \$16,415.87 without interest until the entry of this Judgment and interest thereafter at the rate of 6% per annum until paid, together with its costs and disbursements in the sum of \$37.06.

Dated this 6th day of September, 1949.

/s/ SAM M. DRIVER,

U.S. District Judge.

Presented by:

/s/ HARVEY ERICKSON,

U.S. Attorney.

Approved as to Form:

.....

Witherspoon, Witherspoon &
Kelley,
Attorneys for Defendant.

Copies mailed counsel.

[Endorsed]: Filed September 6, 1949.

[Title of District Court and Cause.]

ALTERNATE MOTION FOR JUDGMENT NOT-
WITHSTANDING DECISION AND FOR A
NEW TRIAL

Comes now defendant, Lomax Transportation Company, and moves the Court for an order in its favor dismissing plaintiff's complaint notwithstanding the decision on the ground that no proof of defendant's negligence was submitted and no competent proof of plaintiff's damage was offered, and that the contract sued upon, which contained the following special provision:

"Contractor assumes absolute responsibility for property in his possession and shall maintain bond and insurance at his own expense in accordance with the State of Washington warehousing laws." was a contract simply for a warehouseman's legal liability, but was erroneously construed by the Court to impose an insurer's liability.

Without waiving the foregoing motion and in the event the same is overruled, the defendant, Lomax Transportation Company, moves the Court to set aside said decision and for an order to amend its findings or to make additional findings and amend the judgment accordingly, or to grant a new trial to defendant, Lomax Transportation Company, upon the following grounds:

I.

Insufficiency of the evidence to justify the decision and that it is against the law.

II.

Error in law occurring at the trial and excepted to at the time by defendant, Lomax Transportation Company.

III.

Total failure of any competent proof of damage to plaintiff.

WITHERSPOON, WITHER-
SPOON & KELLEY,
/s/ W. V. KELLEY,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 14, 1949.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT
NOT WITHSTANDING DECISION AND
FOR A NEW TRIAL

This matter coming on for hearing before the above entitled Court on this 13th day of October, 1949, plaintiff being represented by Harvey Erickson, United States Attorney for the Eastern District of Washington, and the defendant being represented by William V. Kelley of Witherspoon, Witherspoon & Kelley, its attorneys, the Court having heard the argument of counsel, it is,

Ordered, Adjudged and Decreed that the defendant's Alternate Motion for Judgment Notwithstanding Decision and for a New Trial is hereby denied.

Dated this 13th day of October, 1949.

/s/ SAM M. DRIVER,

U.S. District Judge.

Presented by:

/s/ HARVEY ERICKSON,

U.S. Attorney.

[Endorsed]: Filed October 13, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named defendant, Lomax Transportation Company, now known as the Lomax Realty Company, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action September 6, 1949, and filed of record in the above-entitled Court on said date, and from each and every part thereof and from all rulings of the Court; and from that certain Order in the above-entitled cause signed by the Court October 13, 1949, denying defendant's Alternative Motion for Judgment Notwithstanding Decision and for a New Trial, and from each and every error of law committed by the Trial Court.

Dated this 4th day of November, 1949.

/s/ WILLIAM V. KELLEY,
WITHERSPOON, WITHER-
SPOON & KELLEY,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 4, 1949.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON
APPEAL

Know All Men By These Presents:

That the Lomax Transportation Company, now

known as the Lomax Realty Company, a corporation, the defendant above-named, as principal, is held and firmly bound unto the United States of America, the plaintiff above-named, in the just and full sum of \$18,000.00, for which sum, well and truly to be paid, it binds itself, its successors and assigns, firmly by these presents.

Sealed with our seals and dated this 1st day of November, 1949.

The Condition of This Obligation Is Such, That,

Whereas, the above-named plaintiff on the 6th day of September, 1949, in the above-entitled action and Court, recovered judgment against the defendant, Lomax Transportation Company, a corporation, for the sum of \$16,452.93 with interest thereafter until paid in the sum of 6% per annum, and

Whereas, the above-named defendant and principal, Lomax Transportation Company, now known as Lomax Realty Company, a corporation, has heretofore given due and proper notice that it appeals from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit, and

Whereas, the above-named defendant and principal, Lomax Transportation Company, now known as Lomax Realty Company, has deposited its certified check in the sum of \$18,000.00 in lieu of a Supersedeas and Cost Bond on Appeal.

Now, Therefore, the Clerk of the District Court of the United States for the Eastern District of

Washington, Northern Division, is instructed to pay to United States of America, plaintiff above named, all costs and damages that may be awarded against said principal and defendant, Lomax Transportation Company, now known as Lomax Realty Company, a corporation, on the appeal or on the dismissal thereof, and the said Clerk is further directed to satisfy the judgment or order appealed from, and any judgment or order which the said Circuit Court of Appeals for the Ninth Circuit may render or make, or order to be rendered or made by said District Court of the United States for the Eastern District of Washington, Northern Division.

LOMAX REALTY COMPANY,
a corporation (Formerly LOMAX TRANSPORTATION COMPANY).

By /s/ J. M. LOMAX.

[Endorsed]: Filed Nov. 4, 1949.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
TO BE CERTIFIED FOR APPEAL PURPOSES
AND STATEMENT OF POINTS

Comes now Lomax Transportation Company, a corporation, (now known as Lomax Realty Company), defendant, and hereby designates the follow-

ing parts of the record and proceedings to be included in the record on appeal with the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. Summons and Complaint.
2. Defendant's Motion to Dismiss.
3. Order Denying Defendant's Motion to Dismiss signed and filed December 9, 1947.
4. Order for Pre-Trial Conference signed and entered February 11, 1948.
5. Order on Pre-Trial Conference filed February 25, 1948.
6. Amended Answer.
7. Motion to Strike a Portion of Defendant's Answer.
8. Order on Motion to Strike dated April 7, 1949.
9. Reply.
10. Pre-Trial Order signed and filed April 1, 1948.
11. Reporter's transcript of all testimony, evidence and proceedings at the trial, including the rulings of the court on the admission and exclusion of testimony.
12. Findings of Fact and Conclusions of Law signed by the court on September 6, 1949.

13. Judgment in favor of Plaintiff signed and entered September 6, 1949.

14. Alternate Motion for Judgment Notwithstanding the Decision and for a New Trial.

15. Order Denying Alternate Motion for Judgment Notwithstanding the Decision dated October 13, 1949.

16. Exhibit 1: pages 5 and 6, 19, 20 and 21 of Record of Proceedings of a Board of Investigation convened at U. S. Naval Supply Depot, Spokane, Washington, by order of Supply Officer in Command, U. S. Naval Supply Depot, Spokane, Washington, to inquire into and report on the loss of Navy property by fire in the Lomax Fireproof Warehouse, 124 S. Wall Street, Spokane, Washington, December 27, 1944. Exhibit 3, Exhibit 4, Exhibit 8 and Exhibit 11.

17. Order upon Stipulation.

18. Notice of Appeal and Bond on Appeal.

The Clerk of the above-entitled Court is hereby directed to prepare, certify and transmit to said Circuit Court of Appeals the above designated Record on Appeal.

Appellant hereby designates for consideration on this appeal the following points:

1. The liability of the defendant was that of a warehouseman. At common law in the absence of a special agreement the bailee was not an insurer nor

absolutely responsible for goods in its custody. Such liability was not enlarged by the Washington statute providing for warehouseman's liability as follows:

“The warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.” Remington's Revised Statutes §3607.

2. The defendant Warehouse Company would only be responsible for the exercise of ordinary diligence and care, but would not be responsible for loss or damage to goods caused by fire, Act of God or other causes beyond its control.

3. The contract as drawn by the Navy was ambiguous. The Navy used a Government printed form contract designated S & A Form 102 (Revised 1943) printed and used for the procurement of supplies. This printed form contract was used as a contract for the leasing of warehouse space and furnishing warehouse services and a scrivener for the Navy without legal training typed in a special provision reading as follows:

“4. a. Special Provisions: The contractor assumes absolute responsibility for property in his possession and shall maintain bond and insurance

at his own expense in accordance with the State of Washington warehousing laws.”

Defendant Warehouse Company signed the contract believing it was to be held to a warehouseman’s liability only and Navy stores were destroyed by a fire without any negligence of the warehouseman.

4. The Navy could only require defendant Warehouse Company under the contract to obtain insurance at its own expense in accordance with its liability under Washington warehousing laws, and consequently the Navy could only hold the defendant Warehouse Company responsible for the exercise of ordinary diligence and care. The defendant Warehouse Company did obtain insurance covering a warehouseman’s liability.

5. The contract between the Government and the defendant Warehouse Company must be interpreted in conformity with current Naval regulations which provided in part:

“Variations in the general provisions will not be made except when authorized by the Bureau of Supplies and Accounts.” Volume 1, Bureau of Supplies & Accounts Manual, page 196, Article 1061, Sec. 1.

and also

“The Navy Department has adopted a general policy of self-insurance, under which it assumes the risk of loss or damage to Government owned property in the hands of contractors. Pursuant to this policy, uniform insurance provisions have

been inserted in the Government furnished material clause, and the advance and partial payment clauses. Field purchasing officers will not include any other insurance provisions in contracts without the approval of the Bureau of Supplies and Accounts, and the Assistant Secretary of the Navy, Material Division. (Procurement Branch, Insurance Section)." Volume 1, Bureau of Supplies & Accounts Manual, page 196, Article 1061, Sec. 3 (g).

6. The Navy's own interpretation of the contract was that the warehouseman could be only held for negligence as shown by its acceptance of warehouse receipts specifically providing in part:

"Received for the account of Naval Supply Depot, Velox, Washington, for storage, the goods or packages enumerated in the schedule below upon the following terms and conditions, said goods stored in warehouse located at S. 124 Wall Street, Spokane, Washington:

"The Company will be responsible for exercise of ordinary diligence and care, but not responsible for ordinary wear and tear and handling nor for loss and damage to said goods caused by moth, fire, rust or deterioration, Act of God or other causes beyond its control." (Defendant's Ex. 11.)

and by the statements of Navy personnel in salvaging stores and in the findings of the Naval Board of Inquiry that there was no negligence involved and that recovery from the defendant Warehouse Company would be limited to its legal lia-

bility under the existing Washington warehousing laws. (Plaintiff's Ex. 1.)

7. The Government did not adduce competent proof of any damage to its stores, but merely produced a certificate of settlement of the General Accounting Office (printed Form 2042) without offering any competent proof of the correctness of figures thereon or how they were arrived at by anyone who had anything to do with the salvage of the Naval stores or the preparation of the certificate. (Plaintiff's Ex. 3).

8. The certification of this document proved only the document itself and simply permitted its introduction in evidence without further proof of identification, but such certification did not establish as a fact the correctness of statements or figures contained on the back thereof and did not sustain the Government's burden of proof.

/s/ WILLIAM V. KELLEY,
WITHERSPOON, WITHER-
SPOON & KELLEY,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 18, 1949.

[Title of District Court and Cause.]

ADDITIONAL DESIGNATION OF PORTIONS
OF RECORD TO BE CERTIFIED FOR
APPEAL

Comes now the United States of America, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and Frank R. Freeman, Assistant United States Attorney for said District, attorneys for plaintiff herein, and, under the provisions of Rule 75 hereby designates the following additional portions of record and proceedings to be included in the record on appeal with the United States Court of Appeals for the Ninth Circuit:

1. Bill of Particulars.
2. Requests for Admission Under Rule 36.
3. Plaintiff's Interrogatories.
4. Stipulation To Extend Time To Answer Plaintiff's Interrogatories.
5. Order Extending Time To Answer Interrogatories.
6. Reply To Interrogatories.
7. Reply to Request For Admission Under Rule 36.
8. Letter of August 3, 1949, granting judgment.

10. Court's oral ruling on Motion for Judgment Notwithstanding Decision and for a New Trial on October 13, 1949.

11. Designation of additional portions of record to be certified for the purposes of appeal.

/s/ HARVEY ERICKSON,
U.S. Attorney.

/s/ FRANK R. FREEMAN,
Assistant U.S. Attorney.
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 28, 1949.

[Title of District Court and Cause.]

COURT'S REMARKS IN RULING ON DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING DECISION AND FOR A NEW TRIAL

Be It Remembered that the above entitled cause came on at Spokane, Washington, on Thursday, October 13, 1949, before the Honorable Sam M. Driver, Judge of the above entitled Court, the plaintiff appearing by Harvey Erickson, United States Attorney for the Eastern District of Washington, of Spokane, Washington, the defendant appearing by William V. Kelley, of Witherspoon, Witherspoon & Kelley, attorneys at law of Spokane,

Washington, and after arguments of counsel on defendant's Motion for Judgment Notwithstanding Decision and for a New Trial, the Court ruled as follows:

The Court: As I remarked a while ago, this case has continued for a long time, and one reason it did was because of the troublesome questions presented. There were two questions that I thought were particularly difficult in this case. One of them was the construction of this contract, whether to take what appeared to be the plain language as to the liability imposed, or some of these other circumstances that indicated, well, I'd say that perhaps Mr. Lomax had made an improvident contract under the circumstances, at least it developed so after the goods were destroyed by fire. Another very troublesome problem, to me at any rate, was the matter of the offer of proving books of the General Accounting Office or the records of the General Accounting Office to establish the liability of the defendant here. I started out with the thought that it wasn't sufficient, but the cases that I was able to find seem to allow more latitude to the government in this matter of proving an account of this kind by bringing in a certified copy of the General Accounting Office records than I had supposed, and I came to the conclusion that this was *prima facie* evidence, the records of the General Accounting Office, in this case. I could very well be wrong about that.

I can see, of course, the reason for making that provision, because there's no doubt but what as a practical matter in this case and numerous similar cases where war-time transactions were concerned, the government couldn't prove its case if it couldn't prove it in this way, because we all know the numerous naval officers who had to do with this transaction, who not only made the contract, but carried on the subsequent negotiations with Lomax and examined the premises and goods and transported them back to New York where they had to be taken because there was no market for that type of goods here, those officers are not available, the government couldn't get them, they're scattered to the four winds. Of course, that isn't any reason for admitting inadmissible evidence; it merely indicates, I think, why there has been considerable latitude to the government in allowing them to prove transactions by bringing in records of the General Accounting Office.

This one I think is close to the line, but I think it is the duty of the Court to terminate litigation, and this is a short record, it wouldn't be difficult to take it up. The Court will deny the motion and allow an exception.

REPORTER'S CERTIFICATE

United States of America

Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and

acting official court reporter of the District Court of the United States in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held on October 13, 1949, at Spokane, Washington.

That the above and foregoing contains a full, true and correct transcript of the Court's remarks in ruling on Defendant's Motion for Judgment Notwithstanding Decision and for a New Trial.

Dated this 2nd day of December, 1949.

/s/ STANLEY D. TAYLOR,

Official Court Reporter.

[Endorsed]: Filed Dec. 7, 1949.

In the District Court of the United States for the
Eastern District of Washington, Northern
Division

Civil No. 697

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOMAX TRANSPORTATION CO., a corporation,
Defendant.

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above entitled cause came on for trial at Spokane, Washington, on Thursday, May 5, 1949, before the Honorable Sam M. Driver, Judge of the above entitled Court, sitting without a jury; the plaintiff appearing by Harvey Erickson, United States Attorney for the Eastern District of Washington, of Spokane, Washington; the defendant appearing by William V. Kelley, of Witherspoon, Witherspoon & Kelley, attorneys at law of Spokane, Washington; whereupon, the following proceedings were had and done, to-wit:

The Court: You may proceed. We have had so many conferences and motions and arguments on preliminary matters here that I hardly think it would be necessary for you to make an [1*] opening statement unless you care to do so, or point out something particularly that you have in mind.

Mr. Erickson: I have nothing in mind that could not be said in argument, I think, at the conclusion probably better than now. I can state the theory of the government's case, but I think the Court is familiar with it.

The Court: I believe so; I think that I am. You may proceed, then.

Mr. Erickson: If it please the Court, I do not know what state the record of the case is in, but I propose to offer the contract as Plaintiff's Exhibit 1, between the Lomax Transportation Com-

* Page numbering appearing at bottom of page of original Reporter's Transcript.

pany and the government, and the certificate of settlement from the General Accounting Office as Plaintiff's Exhibit 2. I do believe that as a result of the pretrial orders those are already admitted in evidence, but I want to be sure and offer them at this time.

Mr. Kelley: I have here, your Honor, the original contract if the government would like to——

The Court: You're speaking now of the original storage contract?

Mr. Erickson: The storage contract.

The Court: I think that in the pretrial order of February 25, while it isn't admitted in evidence, it's stipulated that either party may offer in evidence the contract, copy of which is attached to the bill of particulars on file herein; that's [2] the same one, isn't it?

Mr. Erickson: Yes.

The Court: ——without objection as to its authenticity.

The Clerk: Here's a certified photostatic copy of it. It would be plaintiff's identification 2, because this document in the later order was marked identification 1.

The Court: Yes, that's right, that's that folder of documents, Board of Investigation File of the Navy Department, has been marked exhibit 1.

Mr. Kelley: I guess that's why we couldn't find it; we were looking for it.

The Clerk: The contract is marked Plaintiff's Identification 2.

Mr. Kelley: With respect to identification 2 of

course we would have no objection as to its authenticity. This thought occurs to me; I have the original one, and I would like to have the privilege of also offering that. It's the original contract that the parties entered into.

The Court: Well, I see no objection to that. The one you have is a photostatic copy, isn't it?

Mr. Erickson: Yes, it's under the seal of the United States as a certified copy of the contract on file in the General Accounting Office, and is admissible under the statutes, I believe, as such.

Mr. Kelley: I would have no objection, but I wanted to [3] also offer this in our case.

The Court: If there's any reason why it should go in——

Mr. Kelley: Yes, there was a reason why I wanted to offer this, on our theory of equitable reformation.

Mr. Erickson: Then I'll offer, and it is admitted without objection, 2.

The Court: Yes, identification 2 is admitted.

(Whereupon, Plaintiff's Exhibit No. 2 for identification was admitted in evidence.)

Mr. Erickson: Then I will offer identification 3, the certificate of settlement from the General Accounting Office, likewise under seal of the United States, admissible under the statutes.

The Court: I think Mr. Kelley has an objection for the record on that, probably.

Mr. Kelley: I'm sorry, I didn't catch that.

The Court: That's this photostatic copy of this settlement in the General Accounting Office. I

assumed you would have an objection to that for the record.

Mr. Kelley: Yes, your Honor.

The Court: It's been discussed a number of times in preliminary proceedings here.

Mr. Kelley: Had you——

Mr. Erickson: Yes, I had offered 3.

Mr. Kelley: The defendant objects to the Plaintiff's [4] Exhibit 3 for identification on the ground that it is not competent. The certificate, whose genuineness as a certificate may be admitted, is merely a self-serving declaration based on hearsay. The seal and authentication of the Comptroller merely make Plaintiff's Exhibit 3 for identification, a photostat, merely makes it admissible equally with the original, but if the original is incompetent, so is the photostat. The certificate doesn't say anything more than the Deputy Comptroller has examined the claims and has struck a balance claimed due the United States, but the original of that wouldn't be competent evidence of damages sustained by the Navy, by the United States, in this case. The certificate, and perforce the original, doesn't state on its face the source of a single matter of fact therein set forth. The defendant isn't apprised from what source this information was derived. No government records are mentioned except at the onset that the Comptroller has "examined and settled the claims of the United States against the person named above." As I stated before to the court, we aren't concerned with

the authenticity of this document, which we admit, but rather with its competency as evidence. I realize that the court has heard extended argument in connection with the motions for summary judgment along this line, and if my memory serves me correctly just last week when we were addressing ourselves to the court on another motion your Honor indicated that perhaps now you had changed your views as to the competency of this document; I don't know to what extent, whether your Honor would rather reserve ruling until we get the evidence in, and here me on it.

The Court: Well, I think I'll admit the document in evidence with the understanding that you have the right to argue to have it stricken out at the end of the trial, and we can argue all the questions of law at one time. I might say that I quite agree with Mr. Kelley that I don't think there's anything magic about a certificate attached to a photostatic copy, that it simply gives the copy the same status as far as admission as the original; it doesn't raise it above the original; if the original is inadmissible and incompetent then the copy would be also, but of course the question here is whether the original is admissible, and I think I remarked the other day it's been a very troublesome question to me because it comes up again and again, and I have been rather reluctantly obliged to conclude that the government has greater leeway than I had any idea they had in the introduction of documents from the General Accounting Office, but I'll admit

it, and you can question it in your argument at the close of the case.

(Whereupon, Plaintiff's Exhibit No. 3 for identification was admitted in evidence.)

Mr. Erickson: With the admission of those two documents we rest.

The Court: I might suggest, Mr. Kelley, I assume that you [6] wish to make a motion here for the record to question the sufficiency of the government's proof, and we might have the same arrangement on that as on this document, reserve your argument on it until the conclusion of the case.

Mr. Kelley: At this time, the plaintiff United States having rested, the defendant Lomax Transportation Company moves for a non-suit and for a dismissal of the complaint on the grounds of a total failure of proof as to any damages sustained by the plaintiff United States Government, and there being no competent evidence adduced to prove the plaintiff's complaint.

The Court: The motion will be denied.

Mr. Kelley: And by the same token, your Honor, I know that you have such a grasp on all the issues there isn't any purpose, unless you desire it, of an extended statement on behalf of the defendant.

The Court: No, I don't believe that would be necessary. As I've said, we've gone over all this matter, and I think the Court is thoroughly familiar with the defendant's position.

Mr. Kelley: Mr. Lomax, will you take the stand, please?

J. M. LOMAX

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kelley:

Q. Will you please state your name to the Court?

A. J. M. Lomax.

Q. And you're the president of the defendant Lomax [7] Transportation Company?

A. Yes, sir.

Q. By the way, that has since this action started changed its name?

A. To the Lomax Realty Company.

(Whereupon, original storage contract was marked Defendant's Exhibit No. 4 for identification.)

Q. Mr. Lomax, directing your attention to Defendant's Exhibit 4 for identification, is that a copy of the contract involved in this suit, together with a letter of transmittal by which it was given to you?

A. Yes, it is.

Q. And directing your attention to page 4 of this contract, is that your signature, "J. M. Lomax"?

A. It is.

Mr. Kelley: I'd like to offer this in evidence.

Mr. Erickson: I object to the admission of this document unless there's some reason. If it's an exact copy of the plaintiff's exhibit, I don't see the purpose of it.

(Testimony of J. M. Lomax.)

The Court: Is the letter of transmittal on the photostatic copy also?

Mr. Kelley: No, not on the photostatic copy. I perhaps might ask some preliminary questions to aid your Honor in ruling. [8]

The Court: Well, I think that there might be—it might be a little easier to determine what the original state of this document was, and what part is printed and what part typed in, and the signatures shown——

Mr. Kelley: ——than the photostat; that was really the prime reason for offering it.

The Court: I'll admit it in evidence.

(Whereupon, Defendant's Exhibit No. 4 for identification was admitted in evidence.)

The Court: The record should show, however, that they are the same document, one is the original and one a photostatic copy, so that if there should be an appeal it shouldn't be necessary to send them both up to the higher court. Go ahead.

Q. (By Mr. Kelley): With respect to the background of this Defendant's Exhibit 4, Mr. Lomax, did the Navy send you that exhibit, give it to you?

A. Yes, they sent it to me or gave it to me.

Q. I might ask you, on or about December 26, 1944, you were engaged in the warehouse business?

A. I was.

Q. Where were you located?

(Testimony of J. M. Lomax.)

A. 124 South Wall.

Q. Did the Navy on or about that time inquire of you whether you had any warehouse space? [9]

A. Yes, they did.

Q. How many ware houses did you have at that time?

A. I had three warehouses at that time.

Q. And do you recall the individual of the Navy who made the inquiry? A. Mr. Ball.

Q. You mean Commander, or is it Captain Ball?

A. Captain Ball, I think it was.

Q. And did you have that document signed by the secretary of your company? A. I did.

Q. And who is he?

A. W. W. Witherspoon.

Q. And is that his signature on the fourth page, as secretary? A. Yes, that is his signature.

Q. You recall the fire at your premises on or about December 26, 1944, of course? A. I do.

Q. And by the way, I think it's already in the record, but whereabouts was the address?

A. At 124 South Wall Street, in Spokane, Washington.

The Court: That was December, 1944, the fire?

Q. Yes, on or about December 26, 1944, was it?

A. Yes.

Q. By the way, do you know the cause of the fire? [10] A. I do not; I do not.

(Testimony of J. M. Lomax.)

Q. After the fire did the Navy desire to salvage the materials there for war purposes?

A. Yes, they did; they asked to salvage them and take them over.

Q. On or about that time did you have insurance covering——

A. Yes, I did——

Mr. Erickson: To which—well, I'll withdraw the objection.

Q. Without going into it unnecessarily, what kind of insurance did you have?

A. Well, I had a regular Washington——

Mr. Erickson: Now, I'm going to object to going into that question any further as immaterial to the issues of this case.

The Court: I think that it would be immaterial except that I gather the purpose of it is to show or at least give circumstantial support to his contention that he didn't intend to enter into this kind of a contract; if he had insurance that didn't cover it it's more likely that he wouldn't have made this kind of a contract; is that it?

Mr. Kelley: Yes.

The Court: I'll overrule the objection.

Q. (By Mr. Kelley): What kind of insurance did you have? [11]

A. I had the regular Washington State Warehouse insurance; it's set up by the State of Washington.

Q. By the way, after this fire did you advise your insurance company of the fire?

(Testimony of J. M. Lomax.)

A. I did.

Q. And did the Navy come to the premises there and salvage the material?

A. Yes, they did.

Q. And can you indicate to the Court briefly how the Navy did that, I mean with respect to allowing outsiders in——

The Court: Pardon me; I doubt if the record is clear as to his answer on this question. I think I know what he means, but he said he had the regular Washington State Warehouse insurance. It was with a private company; he doesn't mean it was state insurance?

Mr. Erickson: I think the witness can answer the question.

The Court: You think he can, you say?

Mr. Erickson: Yes, I think so.

The Court: As to the type of insurance?

Q. (By Mr. Kelley): Did you have insurance with a private company?

A. Well, it was a private insurance company, yes.

Q. I realize this may be leading, but I know he doesn't know the name and the number and so on; was it the Phoenix Insurance Company of Hartford, Connecticut? [12]

A. Well, I rather think it was.

Q. Their policy number IM 730684, designated "Transportation Floater Policy," will that refresh your recollection?

(Testimony of J. M. Lomax.)

A. Yes, that's the policy, that's right.

Mr. Kelley: Well, I might have this marked——

The Court: Isn't the point here, I don't want to require you by any inquiry I've made to further encumber the record here with documents which are not directly concerned; I gather that the point is, this particular insurance he had insured only against damage by fire resulting from the negligence of the insured?

Mr. Kelley: That's correct.

The Court: It was not an absolute insurance of loss by fire regardless of cause?

Mr. Kelley: I'll put it this way, your Honor please; that was the position taken by the insurer, which I was going to develop.

The Court: By the insurance company?

Mr. Kelley: Yes, by the insurance company, and I don't want to inadvertently——

The Court: He doesn't want to say that he can't recover from the insurance company, I get that; well, put it this way; it was the type of insurance that you warehouse people customarily carried, wasn't it?

A. Yes, that's right, the type that warehousemen carried. [13]

Mr. Kelley: Perhaps I can reach it in another way more properly.

Q. (By Mr. Kelley): You had an insurance connection which wrote private company insurance

(Testimony of J. M. Lomax.)

coverage on your warehouse and materials on or about that time? A. Yes.

Q. And previous to the fire had you indicated to this insurance representative that you wanted complete coverage for every kind of possible loss?

A. I did.

Q. And did you explain to him that the government was storing goods in some or all of your warehouses? A. I did.

Mr. Erickson: I'm going to object to this; I can't see the purpose.

Mr. Kelley: It's leading and suggestive, I know, but it's just preliminary to this point.

Q. (By Mr. Kelley): Did you have other government goods besides what's involved in this lawsuit in some of your warehouses?

A. I did have.

Q. And had you told this insurance representative your needs as to complete insurance coverage?

A. I did.

Q. Mr. Lomax, let me pause for a minute; what business have you been in most of your life? [14]

A. In the transportation and warehouse business.

Q. You came to Spokane and worked for the old Culbertson Store? A. Yes, sir.

Q. You had one team or dray?

A. That's right.

Q. And you started in and built up your own transportation business? A. I did.

(Testimony of J. M. Lomax.)

Q. And have you ever taken any courses in insurance? A. I never have.

Q. Are you at all skilled in the matter of insurance or insurance coverage? A. No, I am not.

Q. Have you customarily in the conduct of your transportation business left those matters to insurance representatives? A. I have.

Q. Well, after the fire you say the Navy salvaged the goods up there? A. Yes, they did.

Q. And how did they do that with respect to letting outsiders in?

A. They brought their own crew in and had their own guards, and they had no one around or in there in their particular quarters; at that time the stuff was all on one floor, and [15] they had a guard on that floor, no one allowed up there.

Q. By guard do you mean marines or soldiers or sailors?

A. Well, no, at that time the government had individuals as guards, they give them a gun and put them up there as a guard.

Q. But they had a guard?

A. They had a guard.

Q. And what was the fact as to whether or not the Navy removed any of those goods while it was salvaging it?

A. Yes, they removed it as they were salvaging.

Q. Where did they take them, if you know?

A. My understanding was they took them to Velox.

(Testimony of J. M. Lomax.)

Q. Where is Velox, for the record?

A. Velox is east of Spokane.

Q. About how far?

A. About fourteen miles.

Q. From your warehouse? A. Yes.

Q. Now, did you receive a preliminary report from the Navy concerning the salvage operations?

A. I did.

(Whereupon, letter dated 2 February 1945 was marked Defendant's Exhibit No. 5 for identification.)

Q. Directing your attention to Defendant's Identification No. 5, what is that? Don't read it. [16]

A. It's the list of the stuff that they sent me after they had removed it.

Q. Who signed it?

A. It's signed here by Mr. Ball.

Q. Captain Ball? A. Captain Ball.

Q. February 2, 1945, addressed to you at 124 South Wall Street? A. That's right.

Q. I perhaps should have asked you this question preliminary to offering that. Did the Navy—when they were taking out the goods from your warehouse did they give any accounting at that time?

A. No, they did not.

Q. Subsequently you received accountings?

A. Yes.

Q. And is this Defendant's Exhibit 5 the first preliminary one you received?

A. That's the first one.

(Testimony of J. M. Lomax.)

Mr. Kelley: I'd like to offer that.

Mr. Erickson: No objection.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 5 for identification was admitted in evidence.)

(Whereupon, letter dated 7 April 1945 was marked Defendant's Exhibit No. 6 for identification.) [17]

Q. Directing your attention to Defendant's Exhibit 6 for identification, did you receive another subsequent accounting under date of April 7, 1945, from the Navy? A. I did.

Q. And is that it? A. This is it.

Q. And from whom did you receive that?

A. It was signed by Captain Ball.

Mr. Erickson: No objection.

Mr. Kelley: I'd like to offer that.

The Court: Six will be admitted.

(Whereupon, Defendant's Exhibit No. 6 for identification was admitted in evidence.)

(Whereupon, letter dated (no date) was marked Defendant's Exhibit No. 7 for identification.)

Q. And subsequent to that time did you receive still a third report from the Naval Supply Depot at Spokane, Washington, from Captain Ball, and is that defendant's Exhibit 7 such a report?

A. Yes, sir, I did.

Mr. Kelley: I'd like to offer it.

(Testimony of J. M. Lomax.)

Mr. Erickson: I'll object to this unless a date is fixed. There's apparently no date on it.

Mr. Kelley: I think as a matter of fact that objection would be well taken technically. It never has [18] had a date on it. I've inquired of Mr. Lomax and everybody as to the date.

The Court: Could you fix some approximate date about when it was received?

Q. (By Mr. Kelley): This exhibit 7, the Navy report in the sum of \$12,359.13, was received about how long after exhibit 6, which was a Navy report under date of April 7, 1945, in the sum of \$12,-270.35?

A. Without any date on that I couldn't say myself just when it was received, because there's no date on the papers anyplace.

Mr. Erickson: I'll withdraw the objection to it, because it's apparently received sometime after April 7.

The Court: I understood his testimony to be it was sometime after the April report, but you don't know just when, is that right?

A. No, I don't know just when.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 7 for identification was admitted in evidence.)

Mr. Kelley: Well, with respect to fixing that date I might be able to do it a little closer with this exhibit.

(Testimony of J. M. Lomax.)

(Whereupon, letter dated May 3, 1945, Fire Companies to Lomax, was marked Defendant's Exhibit No. 8 for identification.)

Q. You had notified your insurance company of the loss, I [19] believe you said?

A. Yes, I had.

Q. Of the fire? A. Yes.

Q. And subsequent to such notification did you receive any word from your insurance company with respect to their position on paying any loss?

A. Yes, I did.

Mr. Erickson: Now, to which we object as to what private arrangements he had with his insurance company. Any dispute that may have existed between the insurance company is incompetent, irrelevant and immaterial.

The Court: I'll overrule the objection. It's a trial before the court, and I can disregard it afterwards.

Q. (By Mr. Kelley): Directing your attention to Defendant's Exhibit 8 for identification, is that a letter received from your insurer subsequent to the notification of the fire and consequent loss?

A. Yes, that's right.

Q. And with respect to fixing the time of that last exhibit, this letter from the insurance company, being Defendant's Exhibit 8 for identification, makes some reference to a Naval Supply claim of \$12,270.35? A. Yes.

(Testimony of J. M. Lomax.)

Mr. Kelley: I'd like to offer Defendant's Exhibit 8. [20]

The Court: This is offered, as I understand it, merely for the purpose of fixing the date of Defendant's Exhibit 7?

Mr. Kelley: That is one of the grounds. The other ground, your Honor please, I would like to offer it on the point that the defendant's insurer denied liability under their coverage. It has a bearing, I think, on this proposition of the standard, the usual form of insurance obtained by warehousemen.

Mr. Erickson: This is a letter from Fred H. Miller of the Fire Companies Adjustment Bureau, New York, to Lomax Grimmer Warehouses, and it certainly isn't relative and material to any of the issues in this case.

The Court: Let me see it.

Mr. Kelley: I might say in explanation that I of course could call Mr. Miller of the Fire Adjustment Bureau and establish the fact that they adjusted and investigated the claims under a variety of insurance companies, one of which was the Phoenix Company involved here. I can do that. I perhaps am so familiar with that fact myself that I overlooked having him here.

The Court: Well, I'll overrule the objection and let it in.

(Whereupon, Defendant's Exhibit No. 8 for identification was admitted in evidence.) [21]

(Testimony of J. M. Lomax.)

(Whereupon, certificate of settlement was marked Defendant's Exhibit No. 9 for identification.)

Q. (By Mr. Kelley): With respect to fixing dates subsequent to the Naval report of Exhibit 7, indicating damages in the sum of \$12,359.13, did you receive some notice from the General Accounting Office of the United States Government fixing the damages at the sum of \$16,415.87, and directing—well, just answer that yes or no.

A. Yes, I did.

Q. And directing your attention to Defendant's Exhibit No. 9 for identification, what is that, or did you get that from the government?

A. This evidently came from the General Accounting Office. I am not familiar enough with the different departments to know who might have sent it, but this was received, all right.

Mr. Kelley: I'd like to offer it simply as continuity. I think it's a copy of yours.

Mr. Erickson: Yes, there's no objection.

The Court: Have you seen this, Mr. Erickson?

Mr. Erickson: Yes, no objection.

The Court: It will be admitted, then.

(Whereupon, Defendant's Exhibit No. 9 for identification was admitted in evidence.)

(Whereupon, letter dated December 13, 1946, was marked Defendant's [22] Exhibit No. 10 for identification.)

Q. Did you receive some kind of a final dun be-

(Testimony of J. M. Lomax.)

fore this suit was brought, from the General Accounting Office of the government?

A. Yes, sir, I did.

Q. And Defendant's Exhibit 10 is a letter under date of December 13, 1946, you received from the Claim Division of the General Accounting Office?

A. Well, as I say, again I don't know who might have sent it, but it came from the government, it looks like from the General Accounting Office.

Mr. Kelley: I'll offer that in evidence.

Mr. Erickson: No objection.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 10 for identification was admitted in evidence.)

Q. By the way, at the Naval Board of Inquiry following the fire did you attend and give testimony?

A. What was that, please?

Q. Did you attend the Naval Board of Inquiry following the fire at your warehouse, and give testimony?

A. Yes.

Q. You're one and the same individual mentioned in the Naval Board of Inquiry as J. M. Lomax?

A. Yes, sir. [23]

Q. On that occasion you told them about your insurance?

A. I did.

Q. And by the way, when you signed Defendant's Exhibit 4, Mr. Lomax, did you intend to assume any responsibility that wasn't your fault or that the insurance company would not cover?

(Testimony of J. M. Lomax.)

A. I did not. I didn't expect to sign anything that I couldn't cover by insurance.

Q. By the way, speaking of signing this contract, directing your attention to page 2 of Defendant's Exhibit 4, and specifically to the phraseology in typewriting thereon, did you do that typewriting?

A. No, I did not.

Q. Do you know who did?

A. No, I do not know who did.

Q. And directing your attention specifically to 4a, special provisions, reading "Contractor assumes absolute responsibility for property in his possession, and shall maintain bond and insurance at his own expense in accordance with the state of Washington warehousing laws" did you type that in?

A. No, I did not.

Q. Anybody at your direction and supervision do it? A. No, they did not.

Q. Did you—well, to put it bluntly, did you read this [24] contract before you signed?

A. Well, I did not read it, because I supposed it was the same as all other government contracts, and I signed a lot of contracts, and I didn't suppose the government would bring anything that was any different from the Washington state laws.

Q. Well, what I'm getting at, was there any discussion by you with anyone in the Navy or United States Government or anywhere else about the typed portions of that contract?

A. No, definitely not.

(Testimony of J. M. Lomax.)

Q. In your other contracts with the Army or other branches of the government had you had any experience with such a clause as appears under 4a, special provisions?

A. Never saw a clause like that before in any government contract.

Q. In your conduct of your warehouses, Mr. Lomax, when the Navy brought goods down to store in your warehouses would you issue any warehouse receipt? A. I did.

(Whereupon, warehouse receipt was marked Defendant's Exhibit No. 11 for identification.)

Q. Directing your attention to Defendant's Exhibit 11 for identification, can you tell the Court what that is?

A. This is a regular Washington state law warehouse receipt that was issued on each and every lot that was taken in [25] the warehouse.

Q. From the Navy?

A. From the Navy or anyone else.

Q. Does that Defendant's Exhibit 11 purport to be covering some of the goods involved in this case?

A. That does not cover anything that—it does not cover fire.

The Court: I think the—well, that's all right. I think he misunderstood the question. He wants to know whether that's a receipt on some goods actually involved in this. A. Oh, yes, this is.

Mr. Kelley: I'd like to offer it.

Mr. Erickson: I will object to it as incompetent

(Testimony of J. M. Lomax.)

and immaterial to any issue in this case. I might state further for the purpose of the record there's no showing made as to which officer in the Navy it was issued, and whether or not it was given to any of the Naval officers in exchange for goods.

The Court: Well, I think I'll admit it; the question of the effect will be for argument here.

(Whereupon, Defendant's Exhibit No. 11 for identification was admitted in evidence.)

Q. (By Mr. Kelley): Mr. Lomax, after the fire did you have a discussion with Captain Ball and another naval officer relative to salvage? [26]

A. I did. There was a conversation in my office about salvaging the stuff.

Q. And in substance what was said on that occasion with respect to whether or not the Navy could hold you responsible for the fire loss?

Mr. Erickson: Now, to which we object as incompetent and immaterial to any of the issues in this case.

The Court: I'll sustain the objection. I don't believe that any officer could waive liability for the government.

Q. On that occasion, in addition to the salvage point, did Captain Ball and this naval officer discuss this contract of yours which is Defendant's Exhibit 4 with you? A. Yes, they did.

Q. By the way, who was the other naval officer?

A. I do not remember his name. He was introduced to me as the legal authority of the Navy.

(Testimony of J. M. Lomax.)

Q. Well, your counsel at your instructions have made efforts to ascertain the identity of this naval officer?
A. They have.

Q. And you yourself have made some personal investigation?
A. Yes, I have.

Q. When were you over in Seattle before you went on your trip?

A. About the first of March. [27]

Q. Was that before you went on your trip?

A. Yes.

Q. Did you make some investigation there?

A. I did.

Q. At that time, this meeting with Captain Ball and this naval officer whom you say was introduced as a legal adviser for the Navy, what was said if anything respecting the Navy's construction of this contract and its subsequent ability to hold you liable for fire loss?

Mr. Erickson: To which we object as improper, irrelevant and immaterial to the issues in this case, what was said as to the construction of this contract by some other officer.

The Court: He wasn't the Secretary of the Navy, was he?

A. I couldn't say that.

The Court: I'll sustain the objection, then. I doubt if the Secretary could; I don't think anybody lower than the Secretary could place a construction that would be binding on the Navy contracts.

Mr. Kelley: Then simply for the record I offer

(Testimony of J. M. Lomax.)

to prove by this witness J. M. Lomax that he will testify, if permitted, that after the fire Captain Ball of the Velox Supply Depot came into his office at 124 South Wall Street and asked permission for the Navy to salvage, after [28] the Naval Board of Inquiry, and that on this occasion this witness was told in the presence of Captain Ball by the so-called legal adviser of the Navy that the defendant could not be held liable for this fire loss as the Naval Board of Inquiry had established that the origin of the fire was unknown and the findings of fact would indicate no negligence on the part of this defendant, and that the naval officer, who had been introduced by Captain Ball, acknowledged with Captain Ball in Mr. Lomax's office that the Navy in any event could not hold the defendant in this case for the fire loss.

The Court: You renew your objection, Mr. Erickson?

Mr. Erickson: Yes, I do.

The Court: The objection is sustained.

Mr. Kelley: That's the defendant's case.

The Court: You may proceed with the cross-examination.

Cross-Examination

By Mr. Erickson:

Q. Mr. Lomax, were there other letters that were received from the Navy from Captain Ball that were not offered in evidence, beside these, as to this fire loss? A. Not to my knowledge.

(Testimony of J. M. Lomax.)

Q. These are all of them?

A. To my knowledge everything I had I turned over to the attorney. [29]

Mr. Kelley: That's all I have, Mr. Erickson.

Mr. Erickson: Well, I just wanted to make sure that we had them all. I have no further questions.

(Whereupon, there being no further questions, the witness was excused.)

The Court: I don't know that this has too much to do with the lawsuit here, but I was just curious, if insurance companies have this practice of not insuring except for losses in case of negligence, how does a man who stores goods protect himself? Has he got to suffer loss if the goods burn and you don't cause the fire?

Mr. Lomax: That's what I'm trying to find out.

The Court: It seems rather queer to me that the man who stores goods in the warehouse has to take a chance on collecting for them if they're destroyed, unless he can prove that the warehouseman was negligent.

Mr. Kelley: As a proposition of underwriting, I literally turned my office upside down today to try to find the original policy with the Phoenix Insurance Company. We have here a copy of that original policy, and my partners and associates insist that that is all that we have ever had, but I was sure we had the original. I don't know whether Mr. Erickson would want to agree that this was a copy of that original policy, and simply agree that

it was a copy, but not as to any competency or [30] materiality or relevancy, and if it would help the court any——

The Court: I was just curious about that phase of it. I don't think there's any question but what the insurance company has taken the attitude they're not liable, as the documents in evidence would indicate, and apparently they claimed that there was a clause in there that didn't make them liable if the warehouseman entered into an agreement for liability beyond what the laws of Washington provide for, in the absence of special contract, and they claimed that provision was in their policy, so I don't think there's any question about their denying liability. I was just curious about the one phase of it.

Mr. Kelley: And someone in the defendant's position is placed in a most fearful position, really, because you're bound by the terms of these standard policies to cooperate to every extent, and you can't admit liability or they say you haven't any coverage, and if you dispute with them on the question of whether or no there is that coverage, you have to sue them within a limited length of time, a year or eighteen months, and a perfect example is this case; it's gone several years now, and it's really a deplorable situation.

The Court: Do you have any further testimony, Mr. Kelley? [31]

Mr. Kelley: No.

The Court: Do you have any?

Mr. Erickson: No, I haven't anything.

The Court: I think we'll take a ten minute recess.

(Short recess.)

Mr. Kelley: Your Honor, during recess I learned that I was laboring under a misapprehension that this Plaintiff's identification 1, being the general file, was not going in in toto, and that if I desired any extracts from it that I'd better offer them individually. I'd like to ask the indulgence of the Court to re-open for a moment to do that.

The Court: Yes, you may do that.

Mr. Kelley: Will you, Mr. Clerk, abstract from Plaintiff's Exhibit 1 for identification the memo of February 7, 1945, and likewise the letter of January 6, 1945, directed to the Supply Officer in Command, signed by Lomax Transportation Company; and the record of proceedings of a board in investigation convened at United States Naval Supply Depot, Spokane, Washington, to inquire into and report on the loss of Navy property by fire in the Lomax Fireproof Warehouse at 124 South Wall Street, Spokane, Washington, the date of December 27, 1944, and specifically the findings of fact and opinion thereof, and that portion of the testimony of Jess M. Lomax as set [32] forth on page 6 thereof, more specifically in words and figures as follows: "Question: What type of insurance did you carry on the contents of the building? Answer: I carried the standard type of insurance coverage as is required by the state of Washington ware-

house laws. In addition to this I carry \$15,000 additional all risk coverage”.

The Court: It may be a little hard to extract portions of pages out of there.

Mr. Kelley: Yes, that thought occurs to me. I'll offer that record of the Board of Inquiry last referred to in toto, so that it won't be mutilated, and if Your Honor deems it competent as to those portions that I offered, I'm further willing to stipulate that the court disregard the rest of it, to avoid mutilation. Would that be satisfactory?

Mr. Erickson: Yes. I don't wish to object to anything that may aid the Court, but I do not think the material in that file will be very helpful to any of the issues in the case, but I have no objection to the whole file going in.

Mr. Kelley: Well, I'll join in a stipulation for the whole file, and I'll say to the Court it has some probative value; I don't deem it controlling, at all, but it has some probative value on these two features, on the [33] question of reformation of the contract here; it indicates that Mr. Lomax—when I say Mr. Lomax I mean the defendant's good faith in securing what it apprehended to be the standard form of warehouse coverage, and secondly, it would have a bearing showing that he felt that the defendant was adequately covered and wouldn't have gone into this contract otherwise, and then finally it has some bearing as to the construction and interpretation placed on this form contract by the Navy itself as shown in their opinion.

The Court: Well, why not offer the whole exhibit, then? It's already marked as Exhibit 1, isn't it?

Mr. Kelley: Yes, I will; I'll offer the whole exhibit.

The Court: Plaintiff's identification 1, we can simply receive it in evidence then as Defendant's Exhibit 1, and it will be in evidence for reference.

(Whereupon, Plaintiff's Exhibit No. 1 for identification was admitted in evidence as Defendant's Exhibit No. 1.)

Mr. Kelley: Secondly, as per Your Honor's pre-trial order of April 1, 1948, I would inquire of counsel through the Court whether we can stipulate as to two statements contained in the Bureau of Supplies and Accounts Manual which was in force and effect at the time of the fire, on [34] or about December 26, 1944.

Mr. Erickson: That's already in the pretrial order.

The Court: Well, it's provided in paragraph 2 that the Court may take judicial notice of the Bureau of Supplies and Accounts Manual, but if there's anything that you wish to direct the Court's attention to I think it should be produced and read into the record, because it's rather a large document, isn't it?

Mr. Kelley: Yes; reading, then——

The Court: I think perhaps the easiest way to do that would be for you to simply read into the

record whatever you wish the court to take judicial notice of, and then I'll have it.

Mr. Kelley: Article 1061, entitled "Contract Provisions" page 192—would Your Honor desire me to read it, or just indicate to Mr. Taylor so he could copy it?

The Court: Well, whichever way you prefer. If you can, indicate it to him so that he can copy it, and you can make use of it in your argument then, of course, if you want to call my attention to it.

Mr. Kelley: Section 1, General provisions, commencing on page 192 and ending on page 193, and particularly and specifically the last two sentences thereof: "If the government is furnishing material to be incorporated [35] in the articles purchased, government furnished material (S & A Form 102 (3)) will be used; and if the contract is classified, the classified provisions (S & A Form 102 (4)) will be used. Variations in the general provisions will not be made except when specifically authorized by the Bureau of Supplies and Accounts."

(Reporter's Note: The full text of the section referred to by counsel reads as follows:

"All fixed price supply contracts shall contain the uniform clauses set forth in the general provisions included in the tender (S and A Form 90 (2)), and the standard two party contract (S and A Form 102 (1)), and execution sheet (S and A Form 102 (5)). They shall also contain termination provisions, either the long form (S and A Form 102 (2)) or the short form (S and A Form 102 (2A)). The

long form termination provisions are required in all contracts in excess of \$50,000, except running term contracts and contracts with other departments, agencies or instrumentalities of the Government, or with states or instrumentalities or subdivisions thereof. The long form termination provisions also may be used in any contract when requested by the contractor or when considered desirable by the contracting officer. When the long form termination provisions are not used, the short form termination provisions will be employed. If the Government is furnishing material to be incorporated in the articles purchased, Government furnished material (S and A Form 102 (3)) will be used; and if the contract is classified, the classified provisions (S and A Form 102 (4)) will be used. Variations in the general provisions will not be made except when specifically authorized by the Bureau of Supplies and Accounts.”

(End of Section 1, General provisions.)) [36]

Mr. Kelley: And another, for the record, Article 1061, Subsection g, on page 196 of volume 1 of Bureau of Supplies and Accounts, reading as follows:

“G. Insurance. The Navy Department has adopted the general policy of self-insurance under which it assumes the risk of loss or damage to government owned property in the hands of contractors. Pursuant to this policy, uniform insurance provisions have been inserted in the government furnished material clause and the advance and par-

tial payment clauses. Field purchasing officers will not include any other insurance provisions in contracts without the approval of the Bureau of Supplies and Accounts and the Assistant Secretary of the Navy, Material Division (Procurement Branch, Insurance Section)."

Mr. Erickson: I have a section in here I would like for the Court to consider.

The Court: Yes, all right.

Mr. Erickson: It is Section 1071 of the Bureau of Supplies and Accounts Manual, Amendments and Modifications of Contracts. It reads as follows:

"Operating under the authority of the First War Powers Act and Executive Order 9001, contracting or purchasing officer may, upon agreement of both parties, make contract amendments or modifications to the same [37] extent and in the same manner as original contracts, subject to the limitation set forth in paragraph 2. All amendments and modifications shall be made in writing and shall be accepted by the contractor. No special form need be employed for this purpose, but the form used should contain the contractor's acceptance and a recital that the amendment is made pursuant to the First War Powers Act, and will facilitate the prosecution of the war. Copies of amendments and modifications shall be distributed to the same addressees as the original purchase documents."

And in subsection 4 of the same article, 1071, entitled "Amendments to correct mutual or apparent mistakes" reading as follows:

“Amendments to correct mutual or apparent mistakes may be made by contracting officers when approved by the Bureau of Supplies and Accounts. ‘Mutual mistakes’ are defined as mistakes due to failure to express in the written document the negotiated agreement as both parties understood it, and ‘apparent mistakes’ as those mistakes which are so obvious that they should have been apparent to the purchasing officer. When it is desired to relieve contractors from such mistakes, a complete statement of facts shall be submitted to the Bureau of Supplies and Accounts.”

And subparagraph 5, entitled “Amendments, modifications and extensions of completed contracts”: [38]

“Except for the change orders made pursuant to the provisions of the contract, purchasing officers shall not amend, modify or extend completed contracts without the approval of the Bureau of Supplies and Accounts and the office of Procurement and Material. Completed contracts are those under which all work which is required to be done to entitle the contractor to final payment has been performed. If the proposed amendment, modification or extension of the completed contract is supported by consideration, a new contract normally should be made.”

And subsection 6:

“Matters which give rise to contract amendments or modifications: Questions raised as to the propriety, correctness, adequacy or clarity of contract provisions shall be disposed of prior to the execu-

tion of the contract when possible. In no instance should a contracting officer execute a contract when at the time of execution he intends to recommend an amendment without consideration. When contractors express dissatisfaction with the provisions of open contracts, purchasing officers should direct them to file application for amendment or modification immediately. In no case should a purchasing officer suggest or acquiesce in the delay in the presentation of such application until completion of the contract."

Mr. Kelley: Your Honor, being a little uncertain [39] as to the exact status of the excerpts read by myself or Mr. Erickson, just for the record I'd object that all the excerpts to which Your Honor's attention has been directed by counsel for the government are incompetent, irrelevant and immaterial, on the specific grounds that the defendant is praying for a reformation of his contract in a court of law, and while we readily grant the authenticity of these administrative rulings, we submit that they are not the exclusive remedy.

The Court: I think the provision in the pretrial order is that the Court can take judicial notice of any pertinent provision of this Bureau of Supplies and Accounts Manual, and the matter of the pertinency will have to be passed on by the Court. In other words, I think the thing to do is call it to my attention, and then I can decide along with the issues in the case how much weight to give to the various excerpts.

Mr. Erickson: I assume the plaintiff will make the first argument?

The Court: I understand both sides have rested, and it seems to me the way this lawsuit has developed the burden is really on the defendant on the affirmative matter presented, so I'll hear from Mr. Kelley first.

Mr. Kelley: Well, for the record we would renew, if Your Honor pleases, our motion for nonsuit, and both [40] sides having rested, we renew our motion for dismissal of the government's complaint on the grounds of a total failure of proof as to any damages sustained, and that there has been no competent evidence adduced in support of the government's case either as to liability or damage.

(Whereupon, counsel for defendant and plaintiff presented arguments to the Court.)

The Court: It's been some time since I looked at these cases cited in the briefs that were submitted; it's been some time since I looked them over, and particularly in view of the fact that attention has been called to the new judicial code which came into effect in September, I don't know that there's been any substantial change there, but I would like to look at that and look at some of these cases again before I make a final decision in this case. I haven't in mind writing any memorandum opinion; I'll simply notify you by telephone or letter when I have made up my mind, so you can present your findings, but I do want to look at that statute and some of these cases, and decide the case

I hope in the next week or two. I think I have all of your citations here; I'll not ask for briefs, you've briefed it before. If there's nothing else the Court will adjourn until Monday morning at 10 o'clock.

(Whereupon, the Court adjourned.) [41]

REPORTER'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held on May 5, 1949, at Spokane, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had therein, omitting only the arguments of counsel to the Court at the conclusion of such trial.

Dated this 2nd day of December, 1949.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

Copy received Dec. 7, 1949.

/s/ HARVEY ERICKSON,
U. S. Attorney.

[Endorsed]: Filed Dec. 7, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the annexed and foregoing is the Original

Complaint; Summons and Return of Service Thereof; Defendant's Motion to Dismiss; Order Denying Motion to Dismiss, etc.; Bill of Particulars; Order for Pre-Trial Conference; Order on Pre-Trial Conference; Amended Answer; Motion to Strike Portion of Answer; Order on Motion to Strike; Pre-Trial Order; Reply; Requests for Admission Under Rule 36; Interrogatories; Stipulation to Extend Time to Answer Interrogatories; Order Extending Time to Answer Interrogatories; Reply to Interrogatories; Reply to Request for Admission Under Rule 36; Record of Proceedings at Trial; Exhibits and Stipulation Regarding Making Document Part of Exhibit "1"; (exhibits not attached hereto); Findings of Fact and Conclusions of Law; Judgment; Alternate Motion for Judgment Notwithstanding Decision and for New Trial; Court's Remarks in Ruling on Above Motion; Order Denying Motion for Judgment Notwithstanding Decision and for New Trial; Notice of Appeal; Supersedeas and Cost Bond on Appeal; Appellant's Designation of Portions of Record, and Statement

of Points; Appellee's Designation of Additional Portions of Record; and in the cause of United States of America vs. Lomax Transportation Company, No. 697.

That the above and foregoing constitute the record on Appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered by the District Court in the above named District and cause.

In Witness Whereof, I have hereunto set my hand and seal of said court this 10th day of December, 1949.

[Seal] /s/ A. A. LaFRAMBOISE,

Clerk of the United States District Court for the Eastern District of Washington.

[Endorsed]: No. 12422. United States Court of Appeals for the Ninth Circuit. Lomax Transportation Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed December 13, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 12422

UNITED STATES OF AMERICA,

Appellee,

vs.

LOMAX TRANSPORTATION COMPANY, a
corporation,

Appellant.

DESIGNATION OF POINTS AND THE RE-
QUEST FOR PRINTING OF RECORD

I.

Appellant hereby adopts and designates for consideration on this appeal, in lieu of a separate statement, the designation of points on which it intends to rely heretofore designated by appellant and filed in the District Court.

II.

Appellant deems consideration by the court of all of that record, certified to this court by the clerk of the District Court, necessary to this appeal to a proper understanding of the questions presented and hereby requests that same be printed, excepting

and omitting formal parts of pleadings and other court papers.

WITHERSPOON, WITHER-
SPOON & KELLEY,

/s/ WILLIAM V. KELLEY,

Attorneys for Lomax Transportation Company,
Appellant.

Service of the foregoing designation of points relied on and request for printing, by receipt of a copy thereof, is hereby accepted this 20th day of December, 1949.

/s/ HARVEY ERICKSON,

United States Attorney,
Attorney for United States of America, Appellee.